Supreme Court, U.S.
FILED

01 1736 MAY 24 2002

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

NICHOLAS PANARELLA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD L. SCHEFF
Counsel of Record
JILL BAISINGER
MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP
123 South Broad Street
Philadelphia, PA 19109
(215) 772-1500

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

100pgs

QUESTION PRESENTED

1. Can a private citizen with no disclosure obligation be convicted of being an accessory after the fact to a scheme to defraud the public of honest services in violation of section 1343 of Title 18 of the United States Code when the alleged honest services fraud consisted solely of a public official's uncharged concealment of his lawful business relationship with the private citizen without misuse of office?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

OPINION AND JUDGMENT BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE APPROPRIATE SCOPE OF HONEST SERVICES FRAUD PURSUANT TO THE FEDERAL MAIL AND WIRE FRAUD STATUTES 9

A. The Third Circuit's Decision Compounds an Existing Intercircuit Conflict That Requires Resolution by This Court 10

B. Only a "Misuse of Office" Standard Appropriately Limits the Scope of Section 1346 ... 18

1. The Third Circuit's Approach Does Not Provide Fair Notice or Reasonably Limit Honest Services Fraud Prosecutions 18

2. A Misuse of Office Standard Provides Fair Notice While Limiting Honest Services Fraud Prosecutions to Cases of Official Corruption 23

3. Application of "Honest Services Fraud" to the Facts of This Case Uniquely Deprived Petitioner of Fair Notice 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Carpenter v. United States, 484 U.S. 19 (1987) 3

Cleveland v. United States, 531 U.S. 12 (2000) ... 3, 20, 26

Evans v. United States, 504 U.S. 255 (1992) 20, 26

Gregory v. Ashcroft, 501 U.S. 452 (1991) 20

Kolender v. Lawson, 461 U.S. 352 (1983) 22, 29

Liparota v. United States, 471 U.S. 419 (1985) 26

McNally v. United States, 483 U.S. 350 (1987) .... *passim*

Neder v. United States, 527 U.S. 1 (1999) 3, 10

Smith v. Goguen, 415 U.S. 566 (1974) 29

United States v. Antico, 275 F.3d 245 (3d Cir. 2001) .. *passim*

United States v. Bass, 404 U.S. 336 (1971) 20, 26

United States v. Bloom, 149 F.3d 649 (7th Cir. 1998) .. *passim*

United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) ..... *passim*

United States v. Bryan, 58 F.3d 933 (4th Cir. 1995) 14

United States v. Cochran, 109 F.3d 660 (10th Cir. 1997) 17

United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997) 10, 13, 19

United States v. Defries, 129 F.3d 1293 (D.C. Cir. 1997) 11, 12

United States v. deVegter, 198 F.3d 1324 (11th Cir. 1999) 14, 16

TABLE OF AUTHORITIES – Continued

Page

United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000) 16

United States v. Espy, 989 F. Supp. 17 (D.D.C. 1997) 12, 13

United States v. Fernandez, 282 F.3d 500 (7th Cir. 2002) 14

United States v. Frost, 125 F.3d 346 (6th Cir. 1997) 14, 16, 17

United States v. Gold, ___ F.3d ___, 2002 WL 833400 (2d Cir. May 1, 2002) 16

United States v. Gray, 790 F.2d 1290 (6th Cir. 1985) 14

United States v. Handakas, 286 F.3d 92 (2d Cir. 2002) *passim*

United States v. Jain, 93 F.3d 436 (8th Cir. 1996) ..16, 19

United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983) 12, 16

United States v. Lopez-Lukis, 102 F.3d 1164 (11th Cir. 1997) 14

United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) 11

United States v. McNieve, 536 F.2d 1245 (8th Cir. 1976) 13, 15, 16, 19

United States v. O'Hagan, 521 U.S. 642 (1997) 14

United States v. Panarella, 277 F.3d 678 (3d Cir. 2002) ..... *passim*

United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978) 15, 16, 19

United States v. Rybicki, 287 F.3d 257 (2d Cir. 2002)..16, 17

United States v. Sawyer, 239 F.3d 31 (1st Cir. 2001) ..14, 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996) ..11, 15

United States v. Schott, 145 F.3d 1289 (11th Cir. 1998)..... 21

United States v. Vinyard, 266 F.3d 320 (4th Cir. 2001)..... 10, 11, 12, 16

United States v. Woodward, 149 F.3d 46 (1st Cir. 1998)..... 15

STATUTES

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (1988)..... 3

18 U.S.C. § 2..... 6

18 U.S.C. § 3..... 1, 4, 6

18 U.S.C. § 1341..... *passim*

18 U.S.C. § 1343..... *passim*

18 U.S.C. § 1346..... *passim*

28 U.S.C. § 1254..... 1

65 Pa. C.S.A. § 1102..... 21

65 Pa. C.S.A. § 1104.....5, 21

65 Pa. C.S.A. § 1105.....5, 21

65 Pa. C.S.A. § 1109.....5, 20

MISCELLANEOUS

134 CONG. REC. S17360-02 (daily ed. Nov. 10, 1988) 3

Fed. R. Crim. P. 11 6

TABLE OF AUTHORITIES – Continued

Page

Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127 (1997) 21

John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, AM. CRIM. L. REV. 427 (Spr. 1998) 11

Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption*, 51 HASTINGS L.J. 699 (2000) 28

PETITION FOR WRIT OF CERTIORARI

Petitioner Nicholas Panarella, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION AND JUDGMENT BELOW

The opinion of the Third Circuit is reported at 277 F.3d 678 (3d Cir. 2002). Pet. App. 1-48. The District Court's Judgment of Conviction is not reported. Pet. App. 49.

JURISDICTION

The Third Circuit's opinion issued on January 11, 2002. Pet. App. 1. Petitioner filed a timely petition for rehearing en banc, which the Third Circuit denied on February 25, 2002. Pet. App. 60. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1343 of Title 18, United States Code, prohibits, in relevant part, any "scheme or artifice to defraud" by means of wire communication in interstate commerce. Pet. App. 62. Section 1346 of Title 18, United States Code, in turn, provides that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pet. App. 63. Other applicable statutory provisions, section 3 and the complete text of section 1343 of Title 18, United States Code, are reproduced in the appendix. Pet. App. 62-63.

STATEMENT OF THE CASE

Petitioner Nicholas Panarella, Jr., has been adjudged guilty of a federal felony based upon a charging document alleging only that he assisted in a public official's efforts to conceal a legal business relationship from a newspaper reporter. Even though the public official was not alleged to have acted improperly with respect to his office or to have been influenced by this relationship, the Third Circuit Court of Appeals affirmed Petitioner's conviction of being an accessory after the fact to a wire fraud based on its conclusion that a failure to disclose a conflict of interest amounting to an appearance of impropriety constituted honest services fraud under federal law. That conduct by the public official constituting, at most, a state law misdemeanor could sustain a federal felony conviction for Petitioner, who himself neither was obligated to disclose the relationship nor subject to Pennsylvania's ethics laws, exemplifies the increasingly confused state of law in this area and the constitutionally impermissible denial of fair notice inherent in the Third Circuit's approach.

Before 1987, the federal courts gradually developed a body of case law interpreting the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to include schemes to defraud another of so-called intangible rights. *See, e.g., McNally v. United States*, 483 U.S. 350, 356-60 (1987); *United States v. Handakas*, 286 F.3d 92, 101-03 (2d Cir. 2002); *United States v. Antico*, 275 F.3d 245, 262 n.16 (3d Cir. 2001). These decisions were " 'uneven' " in their interpretation of what "intangible rights" were encompassed by the statutes, and "court after court warned of prosecutorial abuse" because of the progressive expansion of this concept. *Handakas*, 286 F.3d at 102 (quoting, *inter alia, United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (en banc)).

In *McNally v. United States*, 483 U.S. at 350, this Court reversed lower federal courts' decisions permitting such prosecutions, holding that the federal mail fraud statute, 18 U.S.C. § 1341, "clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 356. As the Court noted, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. . . . Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." *Id.* at 360 (citations omitted).

Shortly after the *McNally* ruling, Congress attempted to "speak more clearly" by enacting the statute presently designated as 18 U.S.C. § 1346. Section 1346 amended the mail fraud chapter to include "a scheme or artifice to defraud another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346); *see also Cleveland v. United States*, 531 U.S. 12, 19-20 (2000) (stating that Congress "amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*"). While the sparse legislative history suggests that Congress intended to reinstate "all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change,"[1] 134 CONG. REC. S17360-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden), doing so simply

---

[1] With the exception of the method of transmission, the federal mail and wire fraud statutes "share the same language in relevant part" and are subject to the same analysis. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987); *Neder v. United States*, 527 U.S. 1, 21 (1999).

recreated the pre-*McNally* divisions among the circuits. *See, e.g., Handakas*, 286 F.3d at 101-02 (describing pre-*McNally* law); *Brumley*, 116 F.3d at 733 (listing examples of unusual prosecutions brought under the intangible rights doctrine).

This confusion among the lower courts has only been exacerbated in the years since the passage of section 1346, as varying interpretations of the statute, particularly in conjunction with pre-*McNally* case law, have created a " 'truly extraordinary statute, in which the substantive force of the statute varie[s] in each judicial circuit.' " *Handakas*, 286 F.3d at 103 (quoting *Brumley*, 116 F.3d at 743 n.6 (Jolly, J., dissenting)). The present case affords the Court the opportunity to provide much-needed guidance on the scope of honest services fraud, in the specific context of a decision in which a public official's conduct, constituting, at most, an uncharged state misdemeanor, led to the federal felony conviction of a private citizen who had no independent disclosure obligation.

1. This case arises out of the conviction of Petitioner Nicholas Panarella, Jr., of being an accessory after the fact to a wire fraud scheme by F. Joseph Loeper ("Senator Loeper") to deprive the public of his "honest services" as a Pennsylvania state senator. Pet. App. 1; *see also* 18 U.S.C. §§ 3, 1343, 1346. The superseding information alleged that Petitioner operated a business that entered into contracts with various state and local governments to collect taxes owed them. According to the superseding information, the so-called "business privilege tax" imposed on non-resident businesses was of particular importance to Petitioner's company. *Id.* at 5.[2] The superseding information also alleged that, beginning in 1993,

---

[2] The case history is taken directly from the Third Circuit's portrayal of the charging document's allegations. Pet. App. 4. As described subsequently, Petitioner does not agree with all aspects of the Third Circuit's interpretation of the superseding

Petitioner engaged Senator Loeper as a consultant and paid him more than $300,000 over the next four years for these consulting services. *Id.*

In 1994, Senator Loeper, then majority leader of the Pennsylvania Senate, appeared with Petitioner before various local governments and attended meetings between Petitioner and state agencies as part of his efforts to support Petitioner's business development efforts. *Id.* In 1994 and 1995, Senator Loeper spoke and voted against proposed legislation that would have restricted the enforcement of the business privilege tax, thereby reducing tax revenues collected by municipalities. This legislation was ultimately defeated. *Id.*

According to the superseding information, in the calendar years 1993 through 1997, Senator Loeper filed false Statements of Financial Interest with the Pennsylvania Ethics Commission, thereby failing to disclose the source of income he received from Petitioner. *Id.* at 5-6; 65 Pa. C.S.A. §§ 1104(a), 1105. Violations of these provisions are misdemeanors with a maximum penalty of a one thousand dollar fine and imprisonment of not more than one year. *Id.* § 1109(b); *see also* Pet. App. 33. The superseding information alleged that, to conceal their financial relationship, Petitioner himself directed third parties to make payments to Senator Loeper on his behalf, although the government did not specifically allege (nor was there evidence) that Petitioner reimbursed those third parties. Pet. App. 6. In August 1997, Senator Loeper lied to a reporter about the sources of his income, and both Senator Loeper and Petitioner asked a third party who made payments to Senator Loeper on Petitioner's behalf to

---

information or of the events at the guilty plea colloquy. However, unless otherwise noted, Petitioner has not articulated these disagreements, as they do not directly affect the narrow question of the propriety of granting a petition for a writ of certiorari.

mislead a reporter regarding this issue. Finally, the superseding information charged that Petitioner edited the third party's response to a letter from the reporter inquiring into the basis for the third party's payments to Senator Loeper. *Id.*

A grand jury returned an indictment charging Petitioner with aiding and abetting mail and wire fraud. Pet. App. 6; *see also* 18 U.S.C. §§ 2, 1341, 1343, 1346. Petitioner ultimately pleaded guilty to a superseding information alleging that he was an accessory after the fact to an honest services wire fraud scheme committed by Senator Loeper. Pet. App. 6; *see also* 18 U.S.C. §§ 3, 1343, 1346. The Third Circuit acknowledged, and the government conceded, that the superseding information did not allege that Senator Loeper had "sold" his vote or was otherwise influenced by his business relationship with Petitioner. Pet. App. 4, 25-27.

2. Petitioner contended before the Third Circuit Court of Appeals that his conviction must be reversed because the superseding information failed to charge a federal crime, even if all allegations therein were accepted as true. In particular, he contended that, because the underlying conduct allegedly committed by Senator Loeper did not, as a matter of law, constitute an honest services wire fraud in violation of sections 1343 and 1346 of Title 18, Petitioner himself could not be guilty of being an accessory after the fact pursuant to section 3 of Title 18. Pet. App. 23.[3] The Third Circuit rejected Petitioner's

---

[3] Petitioner also raised two other contentions before the Third Circuit. First, Petitioner successfully contended that the appellate court could consider the merits of his claims, notwithstanding the entry of a guilty plea. Pet. App. 7-23. Second, Petitioner argued that the district court did not have an adequate factual basis pursuant to Federal Rule of Criminal Procedure 11(f) to accept his guilty plea. Petitioner based this claim in part on his contention that the allegations in the

claims on this point and affirmed the entry of a judgment and conviction by the district court. Pet. App. 49-59.

a. The panel first considered what it described as the question presented by Petitioner's appeal: "under what circumstances nondisclosure of a conflict of interest rises to the level of honest services fraud." Pet. App. 25. Although the panel agreed that the superseding information contained no allegation that Senator Loeper "sold" his vote or that Senator Loeper's financial relationship with Petitioner influenced his decision to speak and vote against proposed legislation, *id.* at 4, 25-27, the court nonetheless held that Senator Loeper had deprived the public of his honest services because he had taken discretionary action that he knew would directly benefit a financial interest that he had concealed in violation of state criminal law. *Id.* at 27. In so holding, the panel declined to adopt the limiting principle applied by the Seventh Circuit Court of Appeals in *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998), which held that an employee deprives another of her honest services under federal law only if she misuses her position or information obtained from it for personal gain. Pet. App. 28 (quoting *Bloom*, 149 F.3d at 656-57). Instead, the Third Circuit held that in some (but perhaps not all) circumstances, state law provided the appropriate standard for determining whether honest services fraud had occurred

---

superseding information did not charge a federal crime. However, he also contended that the limited facts to which he had admitted at the guilty plea colloquy did not establish even those allegations charged in the superseding information. In particular, Petitioner explained that he had conceded only that, as of 1997, he was aware that Senator Loeper had failed properly to complete state ethics forms in 1993. Pet. App. 46-47 & n.20. The Third Circuit rejected this claim without addressing a contested issue regarding the accuracy of the transcript. *Id.*

in connection with "failure to disclose a conflict of interest." *Id.* at 30-31. Accordingly, because the Third Circuit concluded that Senator Loeper had violated a state law, it also concluded that he had committed honest services wire fraud. *Id.*

b. In so holding, the Third Circuit rejected Petitioner's contention that the Seventh Circuit's approach more appropriately avoided concerns regarding the federal government's interference with state and local governments. *Id.* at 32-33. The panel also rejected Petitioner's contention that fair notice and the related rule of lenity required that the scope of honest services fraud be narrowly construed to avoid criminalizing conduct without warning. *Id.* at 41-43. The court acknowledged that "[d]eprivation of honest services is perforce an imprecise standard, and rule of lenity concerns are particularly weighty in the context of prosecutions of political officials, since such prosecutions may chill constitutionally protected political activity." *Id.* at 42. Nonetheless, the Third Circuit held that Senator Loeper's alleged violation of state law along with what it termed evidence of concealment vitiated any claim of lack of notice on the part of either the Senator or Petitioner. *Id.* at 42-43.

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal criminal law that has divided and confused the lower federal courts for years and that is ripe for this Court's review. The questions before the Court concern the permissible scope of an "honest services fraud" pursuant to 18 U.S.C. § 1346 and what limiting principles must be applied to provide constitutionally required fair notice of prohibited conduct. More particularly, Petitioner seeks a writ of certiorari to determine whether a private citizen can be charged with being an accessory after the fact to an honest services fraud by an uncharged public official

who has failed to disclose a legitimate business relationship but who has not been alleged to have misused his office in any way.

As the law has developed, the variations from circuit to circuit have subjected state and local officials and, in some cases, even private individuals, to unprecedented and unpredictable criminal prosecutions based largely on the predilections of federal prosecutors. Moreover, most prosecutions brought under section 1346 raise significant federalism and fair notice concerns, as federal prosecutors effectively decide fundamental questions of state governance by bringing federal charges based on obligations created by state law. Petitioner's conviction squarely implicates these issues, as it is premised on the theory that a state public official may have committed a federal felony based on an appearance of impropriety, which, at most, constituted a state law misdemeanor, rather than on misconduct connected to his office. Because of this unpredictability, which has been exacerbated by the Third Circuit's ruling below, this Court's intervention is warranted to restore consistency and coherence to this area of the law and to provide reasonable limitations as to the statute's scope.

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE APPROPRIATE SCOPE OF HONEST SERVICES FRAUD PURSUANT TO THE FEDERAL MAIL AND WIRE FRAUD STATUTES.

With *McNally*'s holding that the federal mail and wire fraud statutes did not encompass schemes to defraud another of the intangible right of honest services, this Court ended, for a brief period of time, the confusing and divisive question as to what precisely constituted such an honest services fraud. The enactment of section 1346, however, reintroduced the question and, according

to some lower federal courts, "revived" preexisting decisions that had construed honest services fraud in varying ways. The circuit divisions have grown since the implementation of section 1346 and have forced defendants such as the Petitioner to speculate as to what deviations from a federal prosecutor's notion of "good government" will trigger felony mail or wire fraud charges.

A. The Third Circuit's Decision Compounds an Existing Intercircuit Conflict That Requires Resolution by This Court.

A conviction for mail or wire fraud, 18 U.S.C. §§ 1341, 1343, requires proof of a scheme or artifice to defraud, the defendant's participation in that scheme with the specific intent to defraud, and the use of interstate wires or mailings in furtherance of that fraudulent scheme. *See, e.g., Neder*, 527 U.S. at 21; *Handakas*, 286 F.3d at 100. Since enactment of 18 U.S.C. § 1346, it has been clear that the "scheme or artifice to defraud" may be one that deprives another of intangible rights, including the intangible right to the honest services of an elected official. *Id.* However, section 1346 itself offers no guidance to the public, to prosecutors, or to lower courts as to its scope, as it does not define "intangible rights" or "honest services." *Id.*

On the one hand, the lower courts appear to have reached consensus that the "core" prosecutions pursuant to section 1346 are those charging misconduct such as bribery or extortion by a public official. As Justice Stevens' dissent summarized in *McNally*, "In most of these cases, the officials have secretly made governmental decisions with the objective of benefiting themselves or promoting their own interests[.]" 483 U.S. at 362-63 (Stevens, J., dissenting); *see also, e.g., Panarella*, 277 F.3d at 694; *United States v. Vinyard*, 266 F.3d 320, 326 (4th Cir. 2001); *United States v. Czubinski*, 106 F.3d 1069, 1076 (1st

Cir. 1997); *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996). In such cases, courts generally held that the fraud rested "in the fact that the public official is not exercising his independent judgment in passing on official matters." *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979).

Unusual prosecutions, however, have created numerous exceptions to this general principle and have resulted in a patchwork of frequently inconsistent standards, most of which attempt to impose boundaries on a statute that would otherwise be subject only to the limitations of a prosecutor's imagination. Many courts have expressed concern at the lack of clearly defined guidelines as to when honest services fraud prosecutions are appropriate; most recently, the Second Circuit found section 1346 unconstitutional as applied to a private citizen because of just such vagueness and notice considerations. *Handakas*, 286 F.3d at 112; *see also id.* at 102 (citing numerous cases raising concerns); *Antico*, 275 F.3d at 263 (acknowledging that not every breach of fiduciary duty is encompassed by section 1346); *Vinyard*, 266 F.3d at 326-27 (same); *United States v. Defries*, 129 F.3d 1293, 1305-06 (D.C. Cir. 1997) (same).

These attempts to define limits, however, have themselves created an incoherent body of law that has developed in an *ad hoc* fashion in response to particular cases. "Unanchored in any recognizable source of federal, state, or common law, the potential reach of § 1346 has troubled courts and has now been curbed by a string of appellate defeats for the government. Yet no consistent rationale or clear doctrinal lines emerge from all these decisions taken together. Rather, these are cases still searching in a Pirandello-like fashion for a plot." John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, Am. Crim. L. Rev. 427, 430 (Spr. 1998). While the greatest difficulties have presented themselves in the context of prosecutions of individuals in the private sector, *see, e.g.*,

Vinyard, 266 F.3d at 326-27, the present case has characteristics of both public and private sector prosecutions. The underlying charge consisted of allegations against a public official, but the superseding information never alleged that Senator Loeper was guilty of traditional corruption; moreover, the only individual actually charged in relation to the "scheme" was a private citizen. *Panarella*, 277 F.3d at 680-81.

Notwithstanding these general concerns and the unique facts of this case, the Third Circuit appears to have adopted one of the broadest approaches to section 1346 in affirming Petitioner's conviction. In the panel opinion and in another recent decision, *United States v. Antico*, 275 F.3d at 245, the Third Circuit has generally stated that an honest services fraud conviction is proper when a public official conceals, in violation of state criminal law, a financial interest and takes discretionary action in his or her official capacity that the official knows will directly benefit that concealed interest. *Panarella*, 277 F.3d at 680, 691; *see also Antico*, 275 F.3d at 264-65.[4] According

---

[4] In an approach somewhat similar to that of the Third Circuit, the Circuit for the District of Columbia appears to permit conviction of a public official based on concealment of a conflict of interest, but only if it is accompanied by an element of dishonesty. *See, e.g., Defries*, 129 F.3d at 1305 (finding "instructive" pre-*McNally* decision permitting conviction upon breach of fiduciary duty accompanied by a " 'misrepresentation or non-disclosure that is intended to or is contemplated to deprive the person to whom the duty is owed of some legally significant benefit' " (quoting *United States v. Lemire*, 720 F.2d 1327, 1335 (D.C. Cir. 1983))); *United States v. Espy*, 989 F. Supp. 17, 26-28 (D.D.C. 1997) (stating that failure to disclose material information may establish honest services fraud if these conditions are met), partly rev'd on other grounds, 145 F.3d 1369 (D.C. Cir. 1998). In practice, most such cases include allegations of bribery or similar misconduct connected to the official's position, and, as *Espy* noted, public officials have most clearly

to *Panarella* and *Antico*, a conviction is proper even if the concealed interest did not improperly influence the official's actions; that is, there need not be any connection between the concealed interest and the public official's actions. *Panarella*, 277 F.3d at 680.

In an effort to prevent section 1346 from encompassing every ethical violation or breach of fiduciary duty by someone who happens to be a public official, the Third Circuit held in both *Panarella* and *Antico* that the existence of a state law violation may be sufficient to affirm an honest services fraud conviction. *Panarella*, 277 F.3d at 693-94; *Antico*, 275 F.3d at 263-64. However, the court has declined to rule definitively as to whether a state law violation is actually *required* and has, in fact, strongly suggested that it is not, stating "[d]uties to disclose material information affecting an official's impartial decision-making and to recuse himself exist with this fiduciary relationship regardless of a state or local law codifying a conflict of interest." *Antico*, 275 F.3d at 264; *see also Panarella*, 277 F.3d at 693, 699 n.9.

Other circuits have also directed their attention to state law violations in attempting to define the scope of section 1346 but have reached very different results. The Fifth Circuit requires that there be a showing of a violation of state law, but the state law in question must prohibit something more than the "appearance of corruption." *Brumley*, 116 F.3d at 734-35. In contrast, the First,

---

committed honest services fraud "where dishonest conduct by the public official directly implicates the functions and duties of that official's public office." 989 F. Supp. at 26; *see also id.* at 28 n.12 (noting that charges included soliciting and accepting illegal gratuities). Indeed, *Espy* distinguished the facts of cases such as *Czubinski*, 106 F.3d at 1069, and *United States v. McNieve*, 536 F.2d 1245 (8th Cir. 1976), partly because former Secretary of Agriculture Michael Espy was charged to have been improperly influenced. 989 F. Supp. at 28 n.12.

Fourth, and Seventh Circuits have explicitly held that they will not define honest services fraud exclusively or even primarily through state law crimes. *United States v. Sawyer*, 239 F.3d 39, 41-42 (1st Cir. 2001); *United States v. Bryan*, 58 F.3d 933, 940-41 (4th Cir. 1995),[5] abrogated on other grounds in *United States v. O'Hagan*, 521 U.S. 642 (1997); *Bloom*, 149 F.3d at 654-55.

As noted previously, the Seventh Circuit has instead held that "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain." *Bloom*, 149 F.3d at 656-57; *see also United States v. Fernandez*, 282 F.3d 500, 507 (7th Cir. 2002) (distinguishing *Bloom*); *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1985) (noting that honest service fraud by public officials is "anchored" in the official's "misuse of his public office for personal profit"; also permitting conviction when a fiduciary "charged with a public trust deliberately conceal[s] facts to personally benefit from the actions of a public official or public entity")[6]; *United States v. Lopez-Lukis*, 102 F.3d 1164, 1168 (11th Cir. 1997) (stating that the "crux" of public sector honest services fraud is "that when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest"); *but see United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 2000) (stating that a public official's undisclosed conflict of interest "by

---

[5] In this case, the Fourth Circuit declined to offer a more explicit standard for honest services fraud, noting only that the public official's conduct fell "well-within" the statute's parameters. *Id.*

[6] In contemporaneous rulings, the Sixth Circuit has suggested that this standard continues to apply to public officials, although its specific holding regarding private individuals is no longer valid. *United States v. Frost*, 125 F.3d 346, 365-66 (6th Cir. 1997).

itself" harms the constituents' interests). Similarly, in the First Circuit, a public official may be convicted of honest services fraud only upon a showing that the official was influenced or improperly affected in performing her duties or that the official failed to " 'disclose a conflict of interest, resulting in personal gain.' " *Sawyer*, 239 F.3d at 40 (quoting *United States v. Woodward*, 149 F.3d 46, 54 (1st Cir. 1998)).[7] That court has stressed that no honest services fraud will have occurred if the scheme did not actually involve or contemplate deprivation of honest services. *Sawyer*, 85 F.3d at 725 (approvingly citing holdings of *McNieve*, 536 F.2d at 1245, and *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978)). "[A]lthough a public official might engage in reprehensible misconduct related to an official position, the conviction of that official for honest services fraud cannot stand where the conduct does not actually deprive the public of its right to her honest services, and is not shown to intend that result." *Id.* In sum, the Seventh and the First Circuits (and arguably the Sixth and Eleventh Circuits) require a connection between the wrongdoing and the public office.

The other circuits have introduced still different limiting standards. Shortly after the *Handakas* decision finding section 1346 unconstitutional as applied, 286 F.3d at 112, the Second Circuit held that, to avoid a risk of

---

[7] Although not explicitly included as a requirement in that case or subsequently, the Third Circuit's decision in *Antico* quoted *Sawyer*, 85 F.3d at 724, in stating that "undisclosed, biased decision making for personal gain" constitutes honest services fraud. *Antico*, 275 F.3d at 263, 264. However, as described previously, the Third Circuit has issued as its primary holding the much broader principle that a public official may be convicted of honest services fraud based on concealment in violation of a state law of a financial interest. *Panarella*, 277 F.3d at 691; *Antico*, 275 F.3d at 262-63.

unconstitutional vagueness, the elements necessary to "establish the offense of honest services fraud" must include a reasonably foreseeable risk that the scheme "could cause some economic or pecuniary harm to the victim that is more than *de minimis*[.]" *United States v. Rybicki*, 287 F.3d 257, 266 (2d Cir. 2002).[8] Although the case addressed the conviction of a private individual charged with honest services fraud, the broad language of the decision does not explicitly limit itself to such cases and does not suggest that there are separate *elements* for public and private sector defendants. *See id.*; *cf. Vinyard*, 266 F.3d at 328-39 (adopting similar approach with respect to private individuals); *deVegter*, 198 F.3d at 1329-30 (same, although explicitly requiring breach of fiduciary duty); *Frost*, 125 F.3d at 368 (adopting approach similar to *Vinyard* and interpreting *Lemire*, 720 F.2d at 1327, to apply similar standard).

The Eighth Circuit has seemingly held that there must be more than a mere appearance of impropriety in reversing convictions of public officials, public employees, and even some private sector individuals in which there was no proof of actual, as opposed to perceived, wrongdoing, *see, e.g., United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996); *Rabbitt*, 583 F.2d at 1025; *McNieve*, 536 F.2d at 1246; however, this circuit has also held that a private citizen need not even have breached a fiduciary duty for a conviction to stand. *See, e.g., United*

---

[8] A still later decision found that Second Circuit law still allowed prosecutions for honest services fraud when the defendant breached or induced the breach of a duty owed by an employee or agent to his employer or principal that was enforceable by a tort action. *United States v. Gold*, ___ F.3d ___, 2002 WL 833400, at *5 n.5 (2d Cir. May 1, 2002) (quoting *Rybicki*, 287 F.3d at 264); *see also Handakas*, 286 F.3d at 105-07 (stressing difference between wrongs redressable by contract and tort in analyzing honest services fraud decisions).

States v. Ervasti, 201 F.3d 1029, 1036 (8th Cir. 2000). Finally, the Tenth Circuit has required a showing of materiality along with independent evidence of fraudulent intent aside from the scheme, as have various other circuits in some circumstances, albeit primarily in cases addressing prosecutions of private citizens. *United States v. Cochran*, 109 F.3d 660, 667-68 & n.3 (10th Cir. 1997) (summarizing approaches of other circuits); *Frost*, 125 F.3d at 368 (same).

In short, an individual may be convicted of honest services mail or wire fraud in one circuit based on conduct that would require an acquittal or dismissal of an indictment in another. For example, Petitioner's conviction, which was upheld in the Third Circuit, likely would have been reversed in the Seventh Circuit because the charging document contained no allegation of misuse of office. *Bloom*, 149 F.3d at 656-57. Similarly, the Fifth Circuit might well have reversed Petitioner's conviction because the superseding information contained no explicit allegation of state law violation and, to the extent it did, the state statute at issue primarily prohibits the *appearance* of impropriety or corruption. *Brumley*, 116 F.3d at 734-35; *Panarella*, 277 F.3d at 680, 681, 690, 694. Finally, even if the Second Circuit were to find section 1346 constitutional as applied to Petitioner, his conviction likely would be reversed under *Rybicki*, 287 F.3d at 266, as it was not reasonably foreseeable that the purported scheme would deprive the "victim" of any economic benefit – ironically, quite the opposite occurred, as the legislature's collective decision to retain the business privilege tax actually maintained a source of public revenue.

The lower federal courts have expressed dismay at the state of the law, noting that, even prior to the *McNally* decision, they had struggled to define honest services fraud. "It bears emphasis that before *McNally* the doctrine of honest services was not a unified set of rules. And Congress could not have intended to bless each and

every pre-*McNally* lower court 'honest services' opinion. Many of these opinions have expressions far broader than their holdings[, and b]efore *McNally*, the meaning of 'honest services' was uneven." *Brumley*, 116 F.3d at 733; *see also Handakas*, 286 F.3d at 102 (noting same and listing numerous appellate decisions commenting on inconsistency and unpredictability of intangible rights doctrine). The fact that many circuits, including the Third Circuit, *see Panarella*, 277 F.3d at 690, have simply grafted interpretations of section 1346 onto the pre-existing body of case law has exacerbated this "uneven" situation. *See, e.g., Handakas*, 286 F.3d at 102-06 (citing numerous contradictory standards from the various circuits; reiterating prior holding that it would not adopt all pre-*McNally* law). Granting a writ of certiorari would provide much-needed guidance to the lower federal courts and would introduce predictability and consistency into this admittedly difficult area of law.

B. Only a "Misuse of Office" Standard Appropriately Limits the Scope of Section 1346.

1. The Third Circuit's Approach Does Not Provide Fair Notice or Reasonably Limit Honest Services Fraud Prosecutions.

Although the divergence of the circuits on the substantive question of what constitutes criminal liability under the mail and wire fraud statutes provides reason enough to warrant this Court's intervention, the approach taken by the Third Circuit uniquely fails to provide fair notice and places virtually no limits on the potential scope of section 1346. By allowing the felony conviction of a private citizen for being an "accessory after the fact" to an uncharged honest services scheme consisting primarily of a failure to speak rather than improper official action, the Third Circuit's standard delimits honest services fraud such that virtually any

ethical mis-step by a state official, regardless of the significance accorded to that conduct by the state legislature, could lead to primary or secondary felony liability under federal law. This violates basic constitutional requirements of fair notice and implicates related federalism and lenity concerns.

Under a plain reading of the Third Circuit's decisions in *Antico*, 275 F.3d at 245, and *Panarella*, 277 F.3d at 678, the federal government may charge an honest services fraud any time a "public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law." *Panarella*, 277 F.3d at 690. That is, even if an official had, in fact, rendered completely faithful and honest services, she could still be imprisoned for five years for a breach of fiduciary duty unrelated to her office on the theory that she had deprived the public of its intangible rights. *Cf. Czubinski*, 106 F.3d at 1071-72, 1076-77; *Rabbitt*, 583 F.2d at 1025; *McNieve*, 536 F.2d at 1246, 1251-53; *see also Jain*, 93 F.3d at 441-42 (finding no honest services fraud when accused physician "intended to provide and did in fact provide his patients with the highest quality psychological services" even though he accepted "undisclosed, unethical referral fees").

The Third Circuit recognized that not all breaches of fiduciary duty should be prosecuted under the intangible rights theory, as "[t]he prosecution of state public officials for honest services fraud raises federalism concerns about the appropriateness of the federal government's interference with the operation of state and local governments." *Panarella*, 277 F.3d at 693 (citing *McNally*, 483 U.S. at 360). Although Petitioner contended that the most effective way to minimize such concerns while still permitting legitimate prosecutions would be to adopt the Seventh Circuit's "misuse of office standard," the Third Circuit rejected this approach and held that "state law offers a better limiting principle for purposes of determining

when an official's failure to disclose a conflict of interest amounts to honest services fraud[.]" *Panarella*, 277 F.3d at 694.

Leaving aside, for the moment, the fact that neither *Panarella* nor *Antico* required the existence of such a violation, *Panarella*, 277 F.3d at 693, 699 n.6; *Antico*, 275 F.3d at 263-64, the use of such a "limiting principle" directly implicates federalism concerns while increasing the unpredictability of the law. Contrary to the Third Circuit's conclusion, *id.* at 694-95, allowing federal prosecutors single-handedly to determine that what the state has deemed a misdemeanor is, in reality, worthy of a federal felony prosecution invites the federal government to override state and local governments' determination of the appropriate penalties for breaches of state-created obligations. "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States," *United States v. Bass*, 404 U.S. 336, 349 (1971), and this Court has accordingly required a clear statement of congressional purpose before interpreting a statute in such a manner. *Id.*; *see also Cleveland*, 531 U.S. at 24-25; *Gregory v. Ashcroft*, 501 U.S. 452, 457-61 (1991); *McNally*, 483 U.S. at 360. These federalism concerns are important considerations in evaluating competing interpretations of criminal statutes. As Justice Thomas noted in dissent, "[E]ven when Congress has clearly decided to engage in some regulation of the state governmental officials, concerns of federalism play a vital role in evaluating the scope of the regulation." *Evans v. United States*, 504 U.S. 255, 294 (1992) (Thomas, J., dissenting) (citing *Bass*, 404 U.S. at 349).

An examination of the case at hand highlights these issues. The underlying state disclosure statute would, if violated, have been only a state law misdemeanor rather than a federal felony punishable by up to five years imprisonment. *Panarella*, 277 F.3d at 694; *also compare* 18 U.S.C. § 1343 *with* 65 Pa. C.S.A. § 1109(b) (establishing a

maximum of five years imprisonment versus a maximum of one year imprisonment for violation of sections 1104 and 1105).[9] Such a significant divergence in penalties offers stark evidence of the different state and federal approaches to the same conduct. *Handakas*, 286 F.3d at 110; *see also* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1171-74 (1997) (acknowledging federal interest in integrity of local governments, but stressing that state criminal law more likely reflects values and mores of state residents than does federal regulation; contending that federalization of state ethical norms may erode the underlying state law).[10]

It was this concern that spurred, in part, Judge Jolly's dissent in *Brumley*, 116 F.3d at 738, as he argued that tying federal honest services fraud to state law violations would simultaneously allow federal intervention into matters of state concern while violating this Court's

---

[9] Notably, the Third Circuit's opinion below does not explain precisely how any Pennsylvania state law was violated. Indeed, as Petitioner contended below, it is far from clear that Senator Loeper violated the Pennsylvania disclosure rules, given that Pennsylvania ethical rules define a "conflict of interest" so as to *exclude* legislative actions affecting the general public or a subclass "consisting of an industry, occupation or other group which includes the public official . . . or a business with which he . . . is associated." 65 Pa. C.S.A. § 1102.

[10] Moreover, connecting honest services fraud to idiosyncratic state law statutes introduces greater variability into the already expansive mail and wire fraud statutes, as honest services fraud would ultimately vary from state to state within the same federal circuit. *See, e.g., United States v. Schott*, 145 F.3d 1289, 1294 (11th Cir. 1998) (commenting that use of state law in determining whether a license is "property" within meaning of mail and wire fraud statutes has, "not surprisingly, led to directly conflicting results" among the circuits; noting that conflicts will occur within circuits as well, depending on different state law rulings).

requirement, premised on constitutional principles, that a criminal statute provide fair notice of prohibited conduct. *Id.* at 745-47; *see also, e.g., Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Judge Jolly explained:

> *McNally* placed the burden on Congress to put down in statutory form whatever expanded scope it chose to give to the fraud statutes. In effect, Congress was charged with codifying in statutory form the definitions of the conduct which would be prohibited by the concepts of "intangible rights," "honest services," and "good and honest government," and *to expressly indicate whether Congress intended to extend these concepts to the conduct of state officials.* The requirement imposed by the Supreme Court to speak more clearly was not for the benefit of the Circuit Courts which had, in fact, given birth to these concepts in the first place. Rather, the requirement to speak more clearly, in addition to addressing federalism concerns, was for the benefit of the public, the average citizen, the average mid-level state administrator who *must be forewarned and given notice that certain conduct may subject him to federal prosecution.*

Brumley, 116 F.3d at 745-46 (Jolly, J., dissenting) (emphasis added); *see also Handakas*, 286 F.3d at 104 (quoting *Brumley* and noting that, as written, the "plain meaning of 'honest services' . . . simply provides no clue to the public or the courts as to what conduct is prohibited").

Selecting state law as the only basis by which to limit the scope of section 1346 simply does not provide fair notice, particularly in the Third Circuit, where it is not even clear that this is a necessary component of an honest services fraud prosecution. *Brumley*, 116 F.3d at 745-46 (Jolly, J., dissenting); *see also Kolender*, 461 U.S. at 357-58, 361 (analyzing the void for vagueness doctrine as focusing on both the need for actual notice and the "requirement that a legislature establish minimal guidelines to

govern law enforcement" (citation omitted)). Connecting honest services fraud so closely to state law violations would make "every breach of state law (committed in the vicinity of a telephone) . . . punishable as a felony in federal court," thus effecting a "breathtaking expansion of mail fraud." *Handakas*, 286 F.3d at 107.

In sum, either interpretation of the Third Circuit's approach as articulated in *Panarella* and *Antico* creates significant difficulties. If the standard does not include a requirement of a state law violation, the statute would permit felony charges to be brought for virtually any and every breach of fiduciary duty; if it is tied to the state law, it allows federal prosecutors to rewrite state law to impose more severe penalties. Either interpretation runs afoul of this Court's precedent regarding federalism and the due process right of fair notice of the scope of prohibited conduct.

2. A Misuse of Office Standard Provides Fair Notice While Limiting Honest Services Fraud Prosecutions to Cases of Official Corruption.

In contrast to the difficulties presented by the Third Circuit's approach (with or without a requirement of a state law violation), the Seventh Circuit's standard requiring that the public official or employee misuse her office or position for personal gain, *United States v. Bloom*, 149 F.3d at 649, offers fair notice and reasonable guidelines while limiting federal intrusion into state concerns. For these reasons, a reading of the statute adopting the Seventh Circuit's approach is preferable under this Court's precedent addressing fair notice, federalism, and the rule of lenity.

In the *Bloom* decision, the government alleged that Bloom, an attorney and city alderman, had unlawfully advised a corporate client to avoid paying $283,000 in

delinquent property taxes while at the same time retaining control of the property by using an undisclosed agent bidder at a tax scavenger sale of the property. *Id.* at 650-51. The prosecution contended that *Bloom*'s advice had denied the City of Chicago his honest services because, as an alderman, he was the city's fiduciary whose duty of loyalty required him to refrain from giving advice as an attorney that could reduce the city's revenues. *Id.* at 651. The Seventh Circuit, however, affirmed the trial court's dismissal of the indictment because the defendant had not been accused of misusing his office.

In so holding, the Seventh Circuit agreed with the district judge that a reading of the mail fraud statute broad enough to encompass such conduct would create *ad hoc* federal common law crimes that would punish routine breaches of fiduciary duties and even innocent behavior as federal fraud offenses simply because the mails or wires were used in the process. *Id.* at 654-56. Consequently, the Court held that a breach of fiduciary duty, standing alone, could not constitute honest services fraud. *Id.* Rather, under Seventh Circuit law, a public official deprives the public of honest services "only if he misuses his position (or the information he obtained in it) for personal gain." *Id.* at 656.

In establishing this standard, the Seventh Circuit stressed the inappropriateness of criminalizing legal, if unethical, behavior without fair warning. While the government contended that a broader interpretation of section 1346 should be adopted, *id.* at 654, the Seventh Circuit explained that misuse of office or position

> for private gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime. It is how we can give substance to the statement . . . that "not every breach of every fiduciary duty works a criminal fraud." In almost all of the intangible rights cases this circuit has decided (before *McNally* or

> since § 1346), the defendant has used his office for private gain, as by accepting a bribe in exchange for official action.

Id. at 655. The Seventh Circuit explicitly considered and rejected the very standard the Third Circuit seemingly adopted – a principle that would "limit prosecutions to cases in which a defendant's acts not only violated a fiduciary duty but also transgressed some other rule of law," *id.* at 654 – concluding that such an approach simply failed to connect the charged honest services fraud with the status that created the duty in the first place. *Id.* at 654-55. Notably, in discussing this point, the Seventh Circuit explained that misuse of office standard comported most closely with the specific language of *McNally* requiring "personal gain." *Id.* at 655 (citing *McNally*, 483 U.S. at 355).

The Third Circuit's opinion below declined to adopt the Seventh Circuit's approach, holding that this standard did not add sufficient clarity to the scope of an honest services fraud. *Panarella*, 275 F.3d at 691-92. However, the misuse of office standard, of all the many approaches taken by the various federal courts, most effectively limits prosecutions to misconduct connected to the official's public status. As the Seventh Circuit described, without such a limiting principle, any perceived conflict of interest, regardless of whether it has any effect on the public official's decision-making process, would permit a federal felony conviction. *Bloom*, 149 F.3d at 654. "Doubtless there is a limiting principle and some conflicts are tolerable; a member of General Motors' board of directors is (legally) entitled to drive a Ford; but it is frightening to contemplate the prospect that the federal mail fraud statute makes it a crime punishable by five years' imprisonment to misunderstand how a state court in future years will delineate the extent of impermissible conflicts. Then we would have a federal common-law crime, a beastie

that many decisions say cannot exist." *Id.* (citing, *inter alia*, *McNally*, 483 U.S. at 360, and *Bass*, 404 U.S. at 348). Importantly, the misuse of office standard would also allow continued prosecutions of those cases widely believed to be the most appropriate subjects for federal intervention – corrupt – not merely unethical – state or local officials who have accepted bribes or engaged in extortion in their official capacities.

The twin principles of notice and federalism, combined with the imprecision of section 1346, also dictate application of the venerable rule of lenity, which holds that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Bass*, 404 U.S. 348. Application of this rule is intended to provide "fair warning concerning conduct rendered illegal and [to] strike[ ] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Cleveland*, 531 U.S. at 25-26; *see also Bass*, 404 U.S. at 347-48 (explaining that rule of lenity effectuates goals of both fair notice and federalism); *Liparota v. United States*, 471 U.S. 419, 427 (1985) (same). This principle is particularly important when interpreting statutes used in prosecutions of state officials, as indeed *McNally* itself acknowledged in adopting the relatively less harsh reading of the federal mail and wire fraud statutes. 483 U.S. at 360; *see also Evans*, 504 U.S. at 293 n.7 (Scalia, J., dissenting) (noting that *McNally* "simply reiterated the traditional learning that a federal criminal statute, particularly as applied to state officials, must be construed narrowly").

While this rule should not be used if Congress has spoken clearly, *see, e.g.*, *Bass*, 404 U.S. at 344-48, section 1346 is a statute requiring just such a lenient interpretation. Although, as noted previously, the limited floor debate on this statute suggests that Congress intended to

restore pre-*McNally* law, Congress offered little or no guidance as to what it meant by "honest services." *See, e.g., Handakas*, 286 F.3d at 104-05 (noting limited and inconclusive debate); *Brumley*, 116 F.3d at 742-44 (same); *Antico*, 275 U.S. at 262-63 & n.16 (same). In the absence of any but the broadest expression of intent by Congress, the rule of lenity dictates rejection of the approach taken by the Third Circuit, as it would effectively criminalize a wide range of conduct not previously viewed as subject to the scope of section 1346.

3. Application of "Honest Services Fraud" to the Facts of This Case Uniquely Deprived Petitioner of Fair Notice.

In *United States v. Handakas*, 286 F.3d at 92, the Second Circuit found that section 1346 was unconstitutionally vague as applied to a private citizen who breached the terms of his contract with SCA, a public benefit corporation overseeing school construction projects. The contract required that successful bidders pay project workers the "prevailing rate of wages" and submit certified payroll records so demonstrating. Although Handakas submitted such certifications, he had, in fact, paid his workers less than half of the prevailing rate. *Id.* at 96. New York law provided that willful failure to pay less than the stipulated wage scale was a misdemeanor. *Id.* Nonetheless, Handakas was convicted of a federal felony on the theory that he had fraudulently deprived SCA of its contractual rights. *Id.* at 107.

In reversing Handakas' conviction, the Second Circuit found that the statutory text was impermissibly vague as applied to him because "[e]ven someone fully familiar with §§ 1341 and 1346, and our cases, would lack any comprehensible notice that federal law has criminalized breaches of contract." *Id.* at 107. The Second

Circuit found that the statute was also unconstitutionally vague as applied because it delegated basic decisions as to what conduct should be criminalized to prosecutors, judges, and juries, and allowed "juries to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." *Id.* at 108 (citation omitted). The court noted that construing the breach of contract as an honest services fraud directly implicated federalism concerns, most notably because it allowed the federal government to "sharpen the penalty for the violation of certain state laws that, in the estimation of a federal prosecutor, are insufficiently policed or punished by the state itself." *Id.* at 110.

Precisely the same concerns require the intervention of this Court with respect to Petitioner's conviction. Just as the Second Circuit could find no reported mail fraud conviction based on a scheme to deprive another of the performance of "purely contractual duties or of statutorily imposed duties to submit information to a state agency," *id.* at 111, no decision of which Petitioner is aware has permitted a wire fraud conviction premised upon a private citizen's involvement in a misrepresentation to a reporter. While the Third Circuit opinion below suggested that no lenity or notice concerns were implicated in this matter because Senator Loeper himself allegedly violated a state criminal law regarding disclosure of a financial interest, *Panarella*, 277 F.3d at 698, Senator Loeper knew, at most, that he might be charged with a state law misdemeanor; more importantly, Petitioner *himself* had no notice that his alleged involvement after the fact could be the basis of an honest services fraud premised on Senator Loeper's uncharged conduct. *Cf. Handakas*, 286 F.3d at 111; *see also* Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption*,

51 HASTINGS L.J. 699, 719 (2000) (noting that increasingly unusual honest services fraud prosecutions have stretched the scope of the federal mail and wire fraud statutes).

The Seventh Circuit articulated these very concerns in its decision in *Bloom*:

> No one can be sure how far the intangible rights theory of criminal responsibility really extends, because it is a judicial gloss on § 1341. Congress told the courts in § 1346 to go right on glossing the mail fraud and wire fraud statutes along these lines. Given the tradition (which verges on constitutional status) against common-law federal crimes, and the rule of lenity that requires doubts to be resolved against criminalizing conduct, it is best to limit the intangible rights approach to the scope it held when the Court decided (and Congress undid) *McNally*. An employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain.

Bloom, 149 F.3d at 656. The alternative to this narrow approach is an impermissible delegation of basic policy decisions to prosecutors, investigators, and judges, an outcome that this Court has found unacceptable. *Handakas*, 286 F.2d at 107-09 (citing, *inter alia*, *Kolender*, 461 U.S. at 357-58; *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

The Third Circuit's approach allowed a private citizen to be convicted of a federal felony based on the fact that he helped a state public official mislead a reporter, *Panarella*, 277 F.3d at 681-82, creating an overbroad standard that disregards federalism concerns, issues of fair notice, and lenity. This does not comport with this Court's prior rulings on these subjects or with the specific holding of *McNally*, which rejected the notion that federal

prosecutors should become the states' arbiter of good government.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD L. SCHEFF
Counsel of Record
JILL BAISINGER
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 South Broad Street
Philadelphia, PA 19109
(215) 772-1500

Counsel for Petitioner

May 24, 2002

United States Court of Appeals,
Third Circuit.

UNITED STATES of America,
v.
Nicholas **PANARELLA,** Jr., Appellant.

No. 01-1739.

Argued July 31, 2001.
Filed Jan. 11, 2002.

Richard L. Scheff, (Argued), Jill Baisinger, Montgomery, McCracken, Walker & Rhoads, LLP, Philadelphia, PA, Counsel for Appellant.

Patrick L. Meehan, United States Attorney, Robert A. Zauzmer, Assistant United States Attorney, Chief of Appeals, Catherine L. Votaw, Gregory A. Paw, (Argued), Assistant United States Attorneys, Philadelphia, PA, Counsel for Appellee.

Before: BECKER, Chief Judge, AMBRO, and WEIS, Circuit Judges.

OPINION OF THE COURT

BECKER, Chief Judge.

Defendant Nicholas Panarella, Jr. appeals from a judgment of the District Court convicting him of being an accessory after the fact to a wire fraud scheme by F. Joseph Loeper, Jr., then a Pennsylvania State Senator, to deprive the public of his "honest services" as a legislator. *See* 18 U.S.C. §§ 3, 1343 & 1346. Panarella contends that the superseding information to which he unconditionally pleaded guilty failed to charge an offense, and alternatively, that his guilty plea lacked an adequate factual

basis under Federal Rule of Criminal Procedure 11(f). Panarella does not dispute that the facts alleged in the superseding information are sufficient to charge him with being an accessory after the fact to Loeper's scheme to deprive the public of his "honest services" if, under the applicable law, such a scheme existed. Instead, Panarella contends that the facts alleged in the superseding information do not establish that Loeper committed "honest services" wire fraud in violation of 18 U.S.C. §§ 1343 & 1346, and that Panarella therefore cannot be charged as an accessory.

Section 1343 provides, in relevant part, that

> [w]hoever, having devised . . . any scheme . . . to defraud, . . . transmits . . . by means of wire . . . in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

Section 1346 elaborates on the meaning of "scheme to defraud," stating that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." We will refer to this type of fraud as "honest services fraud."

Panarella argues that because the superseding information does not allege that Panarella's payments to Loeper were bribes, or that Loeper's actions as Senator were improperly influenced by the payments he received from Panarella, Loeper did not deprive the public of his honest services. According to Panarella, in the absence of

such allegations, the mere fact that Loeper failed to disclose his income from Panarella's business while speaking and voting against proposed legislation that would have significantly harmed Panarella's business does not amount to honest services fraud. The government responds that to establish that Loeper engaged in honest services wire fraud, it is not necessary to show that his actions as Senator were influenced by his financial relationship with Panarella, but only that Loeper unlawfully concealed a financial interest while taking discretionary action that directly benefitted that interest.

As a threshold matter, the parties dispute whether Panarella's challenge to the sufficiency of the superseding information is waived by his unconditional guilty plea. Panarella relies on our decisions in *United States v. Cefaratti*, 221 F.3d 502, 507 (3d Cir.2000), and *United States v. Spinner*, 180 F.3d 514, 516 (3d Cir.1999), and Federal Rule of Criminal Procedure 12(b)(2), which provides that "objections . . . that [the indictment or information] fails . . . to charge an offense . . . shall be noticed by the court at any time during the pendency of the proceedings." Maintaining that the fact that the charging language in the superseding information tracks the language of the relevant criminal statute is sufficient to conclude that it charges an offense, the government attempts to distinguish challenges that an indictment or information fails to allege a necessary element of an offense, which the government concedes survive a guilty plea, from challenges that the specific facts alleged in an indictment or information are beyond the reach of the relevant criminal statute, which is what it submits is at issue in this case. Disagreeing with the government's position, we hold that

Rule 12(b)(2) and our cases applying this Rule permit a defendant who enters an unconditional guilty plea to argue on appeal that the specific facts alleged in the charging document do not amount to a criminal offense.

Turning to the merits, we reject Panarella's claim that, because the superseding information contains no allegation that Panarella's payments to Loeper improperly influenced Loeper's actions as State Senator, the specific facts alleged in the superseding information fail to establish that Loeper deprived the public of his honest services. Rather, we hold that where a public official conceals a financial interest in violation of state criminal law and takes discretionary action in his official capacity that the official knows will directly benefit the concealed interest, the official has deprived the public of his honest services, regardless whether the concealed financial interest improperly influenced the official's actions. Moreover, because Panarella's challenge to his guilty plea under Rule 11(f) rests on the same legal theory as his challenge to the sufficiency of the superseding information – namely, that there was an inadequate factual basis for concluding that Loeper's official conduct was improperly influenced by his income from Panarella – we reject his Rule 11(f) challenge. Accordingly, we will affirm the judgment of the District Court.

I.

For purposes of determining the sufficiency of the superseding information, we assume the truth of the following facts alleged in the superseding information. Panarella operated a tax collection business that entered

into contracts with various state and local government bodies to collect taxes owed to them under state and local tax laws. In particular, Panarella's business received significant revenue from enforcement of Pennsylvania's "business privilege tax." Panarella developed special expertise and secured marketing advantages in enforcing the business privilege tax against non-resident businesses operating in the taxing jurisdiction but not having a physical place of business within the jurisdiction. His tax collection business depended largely on his ability to produce revenue for local governments by collecting Pennsylvania's business privilege tax from non-resident businesses. Beginning in 1993, he engaged Senator Loeper as a business consultant. Between 1993 and 1997, Panarella paid Loeper more than $330,000 for his consulting services.

Beginning in 1994, while Majority Leader of the Pennsylvania Senate, Loeper supported Panarella's business development efforts by appearing with him before local governments in Pennsylvania and attending meetings with him and the Secretaries of two Pennsylvania state agencies, the Department of Revenue and the Pennsylvania Higher Education Assistance Authority, in an attempt to obtain state collection contracts for Panarella. Moreover, in 1994 and 1995, Loeper spoke and voted against proposed legislation that would have restricted the enforcement of the business privilege tax against non-resident businesses and significantly harmed Panarella's business. These restrictions were eventually defeated.

While he was a Senator, Loeper failed to disclose his income from Panarella as required by 65 Pa.C.S.A. §§ 1104(a) & 1105, filing false Statements of Financial

Interest with the Pennsylvania Ethics Commission for the calendar years 1993 through 1997. To conceal his financial relationship with Loeper, Panarella directed third parties to make payments to Loeper on Panarella's behalf, although the government does not specifically allege that Panarella reimbursed these third parties. Then, in August of 1997, Loeper lied to a reporter about the sources of his income, and Loeper and Panarella asked a third party who paid Loeper on Panarella's behalf to lie to the reporter about the nature of the payments. In addition, Panarella edited the third party's response to a letter from the reporter inquiring into the basis for the third party's payments to Loeper.

A grand jury returned an indictment charging Panarella with seven counts of aiding and abetting mail fraud and wire fraud in violation of 18 U.S.C. §§ 2, 1341, 1343 & 1346. Panarella moved to dismiss the indictment for failure to state a federal crime, but the District Court denied the motion. Represented by experienced counsel, Panarella subsequently signed a plea agreement in which he agreed to plead guilty to a superseding information charging him with one count of being an accessory after the fact to a wire fraud scheme to deprive the public of Loeper's honest services. The superseding information alleged that Loeper had engaged in an honest services wire fraud scheme in violation of 18 U.S.C. §§ 1343 & 1346 and charged Panarella with being an accessory after the fact in violation of 18 U.S.C. § 3. Eschewing the benefit of Rule 11(a)(2), which permits the entry of a conditional plea of guilty under which the point reserved can be raised on appeal, Panarella entered an unconditional plea of guilty to the superseding information and

was sentenced to six months imprisonment, one year of supervised release, and a fine of $20,000. As noted above, Panarella now challenges the sufficiency of the superseding information, and also the trial judge's determination under Rule 11(f) of the Federal Rules of Criminal Procedure that a sufficient factual basis existed to accept the guilty plea.

II.

Before reaching the merits of Panarella's claim that the facts alleged in the superseding information do not amount to honest services wire fraud, we must first decide whether Panarella's appeal is foreclosed by his unconditional guilty plea.

A.

Panarella submits that a challenge to the sufficiency of a charging document may be raised at any time, including on appeal after an unconditional guilty plea. He first invokes the rubric "jurisdictional," arguing that a "jurisdictional defense" survives an unconditional guilty plea, jurisdiction being a matter that can be raised at any time. He also relies on the text of Federal Rule of Criminal Procedure 12(b)(2), which provides that an objection that "the indictment or information fails . . . to charge an offense . . . shall be noticed by the court at any time during the pendency of the proceedings." In Panarella's submission, the plain text of Federal Rule of Criminal Procedure 12(b)(2), together with our cases applying this

rule, require us to reach the merits of his argument notwithstanding his unconditional guilty plea. The government counters that because Panarella did not enter, pursuant to Federal Rule of Criminal Procedure 11(a)(2), a *conditional* guilty plea reserving his right to challenge the sufficiency of the superseding information on appeal, he is precluded from now raising the issue. Because we hold that Rule 12(b)(2) requires us to entertain this appeal notwithstanding Panarella's unconditional guilty plea, we need not reach Panarella's alternative "jurisdictional" argument for why this appeal survives his guilty plea.[1]

We have squarely held that Rule 12(b)(2) applies equally to both objections raised before a District Court and objections raised for the first time before a Court of Appeals. *See Gov. of the Virgin Islands v. Pemberton*, 813 F.2d 626, 631 (3d Cir.1987) ("This court has interpreted

---

[1] Apart from Rule 12(b)(2), the source of law on which Panarella's "jurisdictional" argument rests remains murky; it is unclear to us whether the argument relies on the Fifth Amendment's Grand Jury Clause, putative statutory or Article III limits on federal courts' subject matter jurisdiction, or some rule of federal common law. Indeed, we are unsure whether use of the term "jurisdictional" to refer to challenges to the sufficiency of an indictment is anything more than simply a label used to announce the conclusion that a particular defense survives a guilty plea. *See* Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L.Rev. 1214, 1232 n. 36 (1977) ("[O]nce we have explained why a certain category of defenses survives a plea of guilty, we may find it useful to describe the category as 'jurisdictional' defenses. But calling a defense 'jurisdictional' is a conclusion, not an explanation: it does nothing to explain why the defense should be deemed to survive a guilty plea." (internal citation omitted)).

Fed.R.Crim.P. 12(b)(2) to mean that an objection to an information on the ground that it fails to charge an offense may be raised for the first time on appeal."); *United States v. Wander*, 601 F.2d 1251, 1259 (3d Cir.1979); *United States v. Manuszak*, 234 F.2d 421, 422 (3d Cir.1956). See generally Fed.R.Crim.P. 1 ("These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a). . . . "); Fed. R.Crim. P. 54(a) ("These rules apply to all criminal proceedings . . . in the United States Courts of Appeals. . . . "). We have also held that Rule 12(b)(2) applies even after a defendant has entered an unconditional guilty plea. *See United States v. Cefaratti*, 221 F.3d 502, 507 (3d Cir.2000); *United States v. Spinner*, 180 F.3d 514, 516 (3d Cir.1999).[2]

---

[2] Both *Cefaratti* and *Spinner* permitted a defendant who had pleaded guilty to challenge the sufficiency of the charging document for the first time on appeal. While the positive law that *Cefaratti* and *Spinner* relied on is somewhat unclear, we read *Spinner* and *Cefaratti* as resting, at least in part, on Rule 12(b)(2). *Cefaratti*, in entertaining the defendant's challenge, did not cite Rule 12(b)(2), but rather, cited only *Spinner*. *See Cefaratti*, 221 F.3d at 507 ("Although [defendant] did not raise this argument before the District Court, we will consider it in light of our prior holding that a defendant may challenge an indictment for failure to charge an offense for the first time on appeal."). *Spinner*, in turn, suggested that the rule that an unconditional guilty plea does not preclude an objection that an indictment fails to charge an offense has a constitutional basis. *See Spinner*, 180 F.3d at 515 ("The inclusion of all elements . . . derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present.") (quoting *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir.1988) (en banc)). In addition to suggesting a constitutional basis for its holding, however, *Spinner* also cited Rule 12(b)(2) as support for

The government submits, however, that Rule 12(b)(2) does not apply in this case, because the superseding information does not "fail[ ] . . . to charge an offense." The government argues that, in interpreting Rule 12(b)(2), we should construe the phrase "fails . . . to charge an offense" narrowly, to cover only those cases where the charging instrument completely neglects to mention, even in general terms, an element of the offense. Thus, the government attempts to distinguish our decisions in *Spinner* and *Cefaratti* on the grounds that defendants in those cases argued on appeal that the charging instrument failed even to mention an essential element of the offense charged.

In *Spinner*, the statutory provision under which the defendant was convicted specifically required that "the offense affect[ ] interstate or foreign commerce." 18 U.S.C. § 1029(a). The indictment in Spinner, however, failed to mention interstate commerce. *Spinner*, 180 F.3d at 515. Similarly, in *Cefaratti*, the defendant, who was charged with engaging in monetary transactions in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957, argued that the information failed to allege an essential element of the offense – that the criminally derived property was "proceeds obtained from a criminal offense," as required by 18 U.S.C. § 1957(f)(2). *See Cefaratti*, 221 F.3d at 507. Thus, in both *Spinner* and

---

its statement that "[f]ailure of an indictment sufficiently to state an offense is a fundamental defect . . . and it can be raised at any time." 180 F.3d at 516. Moreover, the cases *Spinner* cited themselves squarely rested on Rule 12(b)(2). *See United States v. Wander*, 601 F.2d 1251, 1259 (3d Cir.1979); *United States v. Manuszak*, 234 F.2d 421, 422 (3d Cir.1956).

Cefaratti, the defendants pointed to specific statutory language that was an essential element of the crime charged and claimed that the charging instrument was deficient because it failed to allege that element.

The superseding information in this case charges that:

> On or about September 8, 1997, in the Eastern District of Pennsylvania, defendant Nicholas Panarella, Jr., knowing that an offense against the United States had been committed, namely, wire fraud in violation of Title 18, United States Code, Sections 1343 and 1346, knowingly and willfully assisted F. Joseph Loeper, Jr. in order to hinder and prevent Loeper's apprehension, trial and punishment by editing the response from S.R. to the reporter so as to continue to conceal the financial relationship between Panarella and Loeper, in violation of Loeper's duty to provide honest services.

Unlike in *Spinner* and *Cefaratti*, Panarella does not point to any specific statutory language that the charging instrument omitted. Indeed, the superseding information in this case tracks the language of the relevant statutory provisions nearly word for word. Rather, Panarella's claim is that the specific facts alleged in the superseding information do not, as a matter of law, satisfy the elements of honest services wire fraud that the superseding information alleges.

More particularly, unlike the defendants' challenges in *Spinner* and *Cefaratti*, Panarella's challenge asks this Court to decide a question of statutory interpretation – whether the federal wire fraud and honest services fraud

statutes apply to the particular facts alleged in the superseding information. In *Cefaratti*, the defendant argued that the relevant criminal offense, as a matter of statutory interpretation, did not subsume the specific facts alleged. The court considered this argument not in the context of the indictment's sufficiency but in the context of defendant's challenge under Rule 11(f) that his guilty plea lacked a sufficient factual basis. *See Cefaratti*, 221 F.3d at 509-11. We thus believe the government's argument offers a plausible ground for distinguishing *Spinner* and *Cefaratti* and for reading narrowly the language "fails . . . to charge an offense" in Rule 12(b)(2).

This interpretation of Rule 12(b)(2), however, is foreclosed by our decision in *Government of the Virgin Islands v. Greenidge*, 600 F.2d 437 (3d Cir.1979). In *Greenidge*, the criminal statute under which the defendant was charged provided that "[w]hoever . . . with intent to commit rape . . . assaults another . . . shall be imprisoned not more than 15 years." 14 V.I.Code Ann. § 295(3) (1964). The information in *Greenidge* tracked this statutory language, alleging that "On or about the 11th day of February, 1978, in the Virgin Islands of the United States, . . . Rafael Greenidge . . . did, with the intent to commit rape, assault one Joseph Lekarzyk, in violation of Title 14 V.I.C., § 295(3)." *Greenidge*, 600 F.2d at 438. We nonetheless sustained Greenidge's argument, raised for the first time on appeal, that the information failed to charge an offense, holding that § 295(3) reaches only those cases in which the person assaulted is the same as the person whom the defendant intended to rape. *Id.* at 438-40. Since on the specific facts alleged in the information the person Greenidge assaulted was different from

the person he attempted to rape, we found that the information failed to charge an offense. *Id.* Citing Rule 12(b)(2), we held that this objection to the charging document may be raised for the first time on appeal. *Id.* at 439 n. 2.

Greenidge is thus like this case, for the charging document tracked the relevant statutory language nearly word for word. And in both this case and Greenidge, the defendant argued that as a matter of statutory interpretation, the specific facts alleged in the charging document fall outside the reach of the relevant criminal statute. *See* Greenidge, 600 F.2d at 439 ("Greenidge contends that the Information . . . reflect[s] an improper interpretation of the statute."). Panarella argues that because the superseding information fails to allege that Panarella's payments to Loeper improperly influenced Loeper's actions as State Senator (and Majority Leader), the facts alleged in the superseding information fail to constitute the offense of honest services wire fraud. If, as the Court held in *Greenidge*, an indictment whose charging language tracks the relevant criminal statute nonetheless "fails . . . to charge an offense," for purposes of Rule 12(b)(2), when the specific facts alleged fall beyond the reach of the statute, Panarella's argument that the specific facts alleged in the superseding information do not amount to honest services wire fraud must also be an argument that the information "fails . . . to charge an offense."

To be sure, the defendant in *Greenidge* never pleaded guilty, but was tried and convicted. Nonetheless, *Greenidge's* interpretation of the phrase "fails . . . to charge an offense" in Rule 12(b)(2) is binding on us in this case, since Rule 12(b)(2) does not distinguish on its face

between defendants who have pleaded guilty and those who have not. As long as Rule 12(b)(2) applies notwithstanding an unconditional guilty plea (and we held in *Spinner* and *Cefaratti* that it does), then we must construe it consistently both in cases where the defendant has pleaded guilty and in cases where the defendant has not.

We are thus constrained to reject the government's contention that an indictment or information charges an offense, for purposes of Rule 12(b)(2), as long as it recites in general terms the essential elements of the offense, even if the specific facts alleged in the charging instrument fail to satisfy those elements. Instead, we hold that, for purposes of Rule 12(b)(2), a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation. Therefore, notwithstanding Panarella's unconditional guilty plea, Rule 12(b)(2) permits Panarella to argue for the first time on appeal that the specific facts alleged in the superseding information do not amount to honest services wire fraud.

In reaching the merits of Panarella's argument notwithstanding his unconditional guilty plea, we join the Fifth, Ninth, and Eleventh Circuits, which have held that an objection that the relevant criminal statute does not reach the specific facts alleged in the charging document shall be noticed for the first time on appeal, even after the defendant has pleaded guilty. *See United States v. Tomeny*, 144 F.3d 749, 751 (11th Cir.1998) (permitting defendants who pleaded guilty to argue on appeal that the indictment failed to charge an offense because the general federal criminal false statement provision under which

defendants were convicted, 18 U.S.C. § 1001, was "pre-empted" by the criminal false statement provision of the Magnuson Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(I)); *United States v. Osiemi*, 980 F.2d 344, 345 (5th Cir.1993) (permitting a defendant who pleaded guilty to possession of a counterfeit passport in violation of 18 U.S.C. § 1546(a) to argue on appeal that § 1546(a) does not apply to possession of a counterfeit passport issued by a foreign government and that the indictment therefore fails to state an offense); *United States v. Caperell*, 938 F.2d 975, 977-78 (9th Cir.1991) (holding that a defendant who pleaded guilty to charges related to the manufacture, distribution, and possession of a controlled substance may challenge the sufficiency of the indictment on the ground that the particular substance involved in the case – methamphetamine – had been approved by the FDA for use in non-prescription drugs and therefore was not a controlled substance); *see also United States v. DiFonzo*, 603 F.2d 1260, 1263 (7th Cir.1979) (holding that a guilty plea does not preclude a defendant from arguing that "the indictment contradicts itself, and, more importantly, that the preliminary factual allegations of the indictment negate one of the elements of the offense charged").

We note that the Fourth Circuit reached a different conclusion in *United States v. Borden*, 10 F.3d 1058 (4th Cir.1993), which held that as long as a charging document recites in general terms all the elements of the relevant offense, a defendant who pleads guilty is barred from arguing on appeal that the specific facts alleged fail to establish a predicate offense. *See id.* at 1063. *Borden*, however, contains no citation of Rule 12(b)(2), and therefore

failed to reconcile its holding with Rule 12(b)(2)'s instruction that an objection that an indictment or information fails to charge an offense shall be noticed at any time during the pendency of the proceedings.

B.

Although for the reasons set forth above, our jurisprudence requires us to take up Panarella's contentions on the merits, in the interest of law reform, we explicate our belief that a rule permitting a defendant who enters an unconditional plea of guilty to challenge his conviction on the ground that the specific facts alleged in the charging instrument fail to constitute an offense has a number of harmful consequences. First, this rule reduces criminal defendants' incentives to raise defenses in a timely fashion in district court. Commentators have noted that the rule permitting defendants to challenge an indictment's failure to charge an offense at any time has led to strategic decisions by defendants to delay raising the defense. *See* 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.1(d), at 741 n. 50 (2d ed. 1999) ("The facts of various cases indicate that the practice of sandbagging, by deliberately postponing the objection, continues as to these defects, particularly the failure to charge an offense.").

Allowing appeals such as this also undermines judicial economy and finality in criminal adjudication. Defendants convicted after pleading guilty have little to lose by arguing, either on direct or collateral review, that the statute under which they were convicted does not reach the conduct alleged in the charging instrument. Requiring

a defendant to raise this defense before pleading guilty respects the proper relationship between trial and appellate courts and prevents the waste of judicial resources caused when a defendant deliberately delays raising a defense that, if successful, requires reversal of the defendant's conviction and possibly reindictment.

Finally, by reaching the merits of Panarella's appeal, we interfere with the ability of defendants (within the Third Circuit) to waive their right to challenge the sufficiency of the charging document in exchange for concessions from the prosecution, thereby making it more difficult for defendants and prosecutors to enter plea agreements that benefit both the parties and society as a whole.[3] To illustrate, consider, for example, a defendant

---

[3] The Supreme Court recognized this point as early as *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), where it observed that plea agreements benefit both prosecutors and defendants and play a fundamental role in our criminal justice system:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages – the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that at present well over

whose defense is that, as a matter of law, the relevant criminal statute should be interpreted in a way that would not reach the particular conduct that the defendant engaged in. Such a defense might present a close call as a legal matter, and after consultation with counsel, a defendant might decide that he would prefer to plead guilty in exchange for prosecutorial concessions rather than run the risk that his legal argument will be rejected by the court and that he will therefore be exposed to a greater sentence than he would have been had he pled guilty. However, at least in some cases, a prosecutor may be unwilling to allow the defendant to plead guilty to a lesser offense unless the defendant enters an enforceable agreement to forgo a subsequent challenge to the sufficiency of the specific facts alleged in the charging document.

Put differently, our holding potentially transforms every guilty plea into a *conditional* guilty plea with respect to the defense that the charging document fails to state an offense. Prosecutors may simply decline to enter plea bargains agreeing to *conditional* guilty pleas (at oral argument the Prosecutor represented that that is what happened in this case) or at least may not offer the defendant as good a "deal" for a conditional guilty plea.

> three-fourths of the criminal convictions in this country rest on pleas of guilty. . . .

Id. at 752, 90 S.Ct. 1463 (footnotes omitted); *see also Mabry v. Johnson*, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) ("[B]ecause each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange." (footnote omitted)).

If a defendant may raise a particular defense on appeal notwithstanding an unconditional guilty plea, then there is no reason why a prosecutor would offer a concession in exchange for the defendant surrendering that defense. By reaching the merits of Panarella's claim, we thus establish a precedent that impedes the ability of a criminal defendant to enter an enforceable plea agreement whereby he surrenders the defense that, as a matter of statutory interpretation, the facts alleged in the charging document do not amount to a criminal offense, even when the defendant believes that surrendering such a defense is in his best interests. *Cf. United States v. Mezzanatto*, 513 U.S. 196, 208, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995) ("A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips.").[4]

---

[4] We have noted that the law governing enforceability of commercial contracts provides guidance in resolving questions arising from plea agreements. *See United States v. Baird*, 218 F.3d 221, 229 (3d Cir.2000) ("Although a cooperative plea agreement is not altogether the same as a commercial arrangement, civil contract law is nevertheless an important and useful aid in interpretation."); *United States v. Nolan- Cooper*, 155 F.3d 221, 236 (3d Cir.1998) ("Plea agreements, although arising in a criminal context, are analyzed under contract law standards."); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J.1909, 1910 (1992) ("Properly understood, classical contract theory supports the freedom to bargain over criminal punishment."). For the same reasons that voluntary commercial agreements generally make both parties to the agreement better off ex ante, counseled, voluntary plea agreements generally inure to the mutual benefit of both the prosecution and the defense. As Professors Scott and Stuntz have argued, a

It is highly doubtful that in this case, Panarella's trial counsel, Edward S.G. Dennis, Jr., who was an experienced criminal defense lawyer as well as the former United States Attorney for the Eastern District of Pennsylvania and Assistant Attorney General of the United States in charge of the Criminal Division, overlooked the particular legal argument that Panarella makes

---

presumption that plea agreements are enforceable expands the range of choices available to criminal defendants:

> [P]lea bargains deserve a presumption of enforceability. . . . Parties who are denied either freedom to contract or freedom to exchange entitlements suffer unnecessary constraints on their choices. . . . [V]oluntary exchange offers people more choices than they would otherwise enjoy and, other things being equal, more choice is better than less.

Scott & Stuntz, *supra*, at 1913, 1918. A rule that a guilty plea forecloses a defendant's right to contest the legal sufficiency of the specific facts alleged in an indictment preserves the range of choice available to defendants, since a defendant could choose either to: (1) plead guilty and thereby waive any legal challenges that the relevant criminal statute does not reach defendant's conduct (and get a better deal); or (2) enter a conditional guilty plea preserving the right to appeal the sufficiency of the particular facts alleged in the indictment, *see* Fed.R.Crim.P. 11(a)(2) (providing for conditional guilty pleas).

To be sure, scholars have long criticized the plea bargaining process on a variety of grounds, many of which question whether a plea agreement presumptively makes both parties better off in the same way that a commercial contract does. *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 Cal. L.Rev. 652 (1981). Defects such as imperfect information, agency costs, and bilateral monopoly infect the negotiation of guilty pleas, and because criminal convictions are public goods, the parties to a plea agreement may fail to internalize the costs that the agreement imposes on society. *See generally* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J.1979 (1992).

on appeal. It is more likely that Panarella, through counsel, deliberately chose to waive this objection to the sufficiency of the information. For this reason, this appeal is particularly troubling.

But it is at least conceivable that Mr. Dennis overlooked the defense that Panarella here raises. If so, leaving aside the possibility that Panarella may claim ineffective assistance of counsel in a habeas proceeding under 28 U.S.C. § 2255, Panarella's guilty plea was not a deliberate waiver of his argument that the superseding information fails to charge an offense. Indeed, as Panarella points out, the plea agreement contains no explicit waiver of Panarella's right to appeal his conviction on

---

While these objections are forceful, they are objections to the entire process of plea bargaining generally, and as such have largely been rejected not only by the common experience of a generation of judges, prosecutors, and defense lawyers, state and federal, but also by the caselaw holding that counseled, voluntary plea bargains are presumptively constitutional. *See, e.g., Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970); *see generally* Scott & Stuntz, *supra*, at 1910 ("The many academic arguments for abolishing (or at least severely restricting) plea bargaining have thus been largely ignored."). There is no reason for concluding that a defendant's waiver of his challenge to the factual sufficiency of an indictment is any more susceptible to defects in the plea bargaining process than those waivers that courts have consistently upheld, *see, e.g., Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (holding that a guilty plea precludes defendant's challenge to the exclusion of African-Americans from the grand jury); *Gioiosa v. United States*, 684 F.2d 176, 180 (1st Cir.1982) (holding that a guilty plea precludes objections to an unlawful search and seizure).

these particular grounds.[5] Nonetheless, a guilty plea is presumed to forfeit those defenses not explicitly reserved by entering a conditional guilty plea. "[W]hen the defendant . . . admits his guilt . . . he assumes the risk of ordinary error in either his or his attorney's assessment of the law and the facts." *McMann v. Richardson*, 397 U.S. 759, 774, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). To require a defendant to enumerate explicitly in a plea agreement each particular defense that the defendant is surrendering would be impractical and would unnecessarily increase the complexity of plea agreements.

The result that we are forced to reach is particularly unwise in view of Rule 11(a)(2), which permits a defendant to enter a conditional guilty plea explicitly reserving the right to raise certain defenses on appeal. By requiring us to entertain Panarella's appeal notwithstanding his unconditional guilty plea, Rule 12(b)(2) renders a conditional guilty plea under Rule 11(a)(2) pointless in cases such as this, and undermines the rule.

For the foregoing reasons, we urge the Judicial Conference Advisory Committee on Criminal Rules to consider amending Rule 12(b)(2) to prevent what has

---

[5] In the written plea agreement, Panarella did waive his right to appeal, but the waiver spoke only to Panarella's right to challenge a sentence falling within the limits agreed to by the parties. We have held that a right of appeal may be waived but that the terms of the waiver must be strictly construed. *United States v. Khattak*, 273 F.3d 557, 2001 U.S.App. LEXIS 26121 (3d Cir.2001). Hence, the plea agreement in this case did not explicitly waive Panarella's right to appeal his conviction on the ground that the superseding information failed to charge an offense.

happened here, particularly in view of its amendments to Rule 11 allowing for conditional guilty pleas.[6]

III.

Turning to the merits of Panarella's defense, we must determine whether, on the facts alleged in the superseding information, Panarella is guilty under 18 U.S.C. § 3 of being an accessory after the fact to a wire fraud scheme to deprive the public of Loeper's honest services, in violation of 18 U.S.C. §§ 1343, 1346. Panarella appears to concede that, on the facts alleged in the superseding information, if Loeper is guilty of committing honest services wire fraud in violation of §§ 1343 and 1346, then he is guilty of being an accessory after the fact under 18 U.S.C. § 3. Thus, although Loeper is not a defendant in this case, the critical question is whether the facts alleged in the superseding information establish that Loeper committed honest services wire fraud.

The federal wire fraud statute provides, in relevant part:

> Whoever, having devised . . . any scheme . . . to defraud, . . . transmits . . . by means of wire . . . in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for

---

[6] To be sure, there may be constitutional objections to precluding a defendant who enters an unconditional guilty plea from challenging his conviction on the grounds that the specific facts alleged in the charging document are beyond the reach of the relevant criminal statute, and in revisiting Rule 12(b)(2) the Committee ought to consider such issues.

> the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343. Section 1346 of Title 18 elaborates on the meaning of "scheme to defraud," stating that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Congress enacted § 1346 in response to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), which overturned a long line of lower court decisions and held that the mail and wire fraud statutes did not reach schemes to defraud citizens of their intangible right to a public official's honest services, but rather were "limited in scope to the protection of property rights." *Id.* at 360, 107 S.Ct. 2875. In interpreting § 1346, we therefore look to both post-*McNally* cases interpreting § 1346 and pre-*McNally* cases interpreting § 1341 and § 1343 for guidance. *See United States v. Antico*, 275 F.3d 245, 262, 2001 U.S.App. LEXIS 25318, at *41 n. 16 (3d Cir.2001) ("[C]ommentary and judicial reflection indicate that [§ 1346] was enacted to overturn McNally and restore the evolution of mail and wire fraud to its pre-*McNally* status."); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir.1997) ("[W]e consider pre-*McNally* cases as persuasive authority in evaluating the scope of honest services.").

"Honest services fraud typically occurs in two scenarios: (1) bribery, where a legislator was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain." *United States v. Antico*, 275 F.3d 245, 262, 2001 U.S.App. LEXIS

25318, at * 45 (3d Cir.2001); *see also United States v. Woodward*, 149 F.3d 46, 54-55 (1st Cir.1998). Because the superseding information does not allege that Panarella bribed Loeper, the question presented by this appeal is under what circumstances nondisclosure of a conflict of interest rises to the level of honest services fraud.

The government argues that because the superseding information alleges that Loeper unlawfully concealed a financial interest while taking discretionary action that directly benefitted that interest, the information sufficiently alleges that Loeper committed honest services wire fraud. The superseding information alleges that from 1993 through 1997 Loeper filed false Statements of Financial Interest in violation of 65 Pa.C.S.A. §§ 1104(a) & 1105, failing to report more than $300,000 in income that he received from Panarella for the consulting services that he provided to Panarella's tax collection business. The superseding information further alleges that during this time Loeper, while serving as Senate Majority Leader, spoke and voted against proposed legislation that would have significantly harmed Panarella's business by restricting the enforcement of the business privilege tax.[7]

---

[7] As a threshold matter, Panarella contends that in construing the superseding information, we should consider only the facts alleged in the charging paragraph, which reads:

> On or about September 8, 1997, in the Eastern District of Pennsylvania defendant Nicholas Panarella, Jr., knowing that an offense against the United States had been committed, namely, wire fraud in violation of Title 18, United States Code, Sections 1343 and 1346, knowingly and willfully assisted F. Joseph Loeper, Jr. in order to hinder and prevent Loeper's

Panarella submits that these allegations alone are insufficient to establish that Loeper committed honest

---

apprehension, trial and punishment by editing the response from S.R. to the reporter so as to continue to conceal the financial relationship between Panarella and Loeper, in violation of Loeper's duty to provide honest services.

On the basis of this language, Panarella submits that the entire scheme to defraud alleged in the superseding information is limited to his efforts to conceal his financial relationship with Loeper from a reporter. We believe, however, that the allegation that Panarella edited S.R.'s response to the reporter defines only Panarella's participation as an accessory after the fact, and that the actual scheme to defraud the public of Loeper's honest services, to which Panarella was an accessory after the fact, is defined by the detailed factual allegations set forth in the body of the superseding information.

More particularly, although the charging paragraph refers to the "conceal[ment] [of] the financial relationship between Panarella and Loeper, in violation of Loeper's duty to provide honest services," we do not read this language as limiting the alleged violation of Loeper's duty to provide honest services to concealment alone. Rather, we interpret this phrase as incorporating by reference the other facts specifically alleged in the body of the superseding information, such as the fact that Loeper took discretionary action as Pennsylvania Senate Majority Leader that directly benefitted Panarella and that Loeper filed false Statements of Financial Interest with the Pennsylvania Ethics Commission. To be sure, the superseding information does not explicitly allege that these facts constituted the scheme to defraud the public of Loeper's honest services, and a court should "not strain to interpret a defective indictment to be in conformity with [the mail or wire fraud statute]."

services wire fraud, since, as the government concedes, there is no allegation that Loeper sold his vote to Panarella or that Loeper's financial relationship with Panarella influenced Loeper's decision to speak and vote against the proposed legislation. We must decide, then, whether allegations that Loeper unlawfully concealed his income received from Panarella while taking discretionary action that Loeper knew would directly benefit Panarella amounts to a scheme to deprive the public of his honest services, or whether an additional allegation that Loeper's discretionary action was influenced by Panarella's payments is necessary.

For the reasons that follow, we hold that where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services under 18 U.S.C. § 1346.

United States v. Olatunji, 872 F.2d 1161, 1166 (3d Cir.1989). Nonetheless, we do not believe that it is a stretch to read the superseding information as alleging that the detailed facts recited in the body of the superseding information as a whole amounted to honest services fraud. Moreover, because Panarella challenges the sufficiency of the superseding information for the first time on appeal, we must construe the information liberally. See *United States v. Cefaratti*, 221 F.3d 502, 507 (3d Cir.2000) ("[W]hen a challenge is urged for the first time on appeal we will construe the indictment liberally in favor of validity.").

A.

In urging us to reverse his conviction, Panarella relies heavily on the Seventh Circuit's decision in *United States v. Bloom*, 149 F.3d 649 (7th Cir.1998), which reversed the honest services fraud conviction of a Chicago alderman who in his private capacity as a lawyer advised a client to use a proxy bidder at a tax scavenger sale at which the client's property was being auctioned, thereby depriving the city of tax revenues. We believe that *Bloom* is distinguishable on its facts, because the alleged scheme to defraud in *Bloom* did not involve anything that the defendant did in his official capacity. The only wrongdoing in *Bloom* was advice given by the defendant in his private capacity as a lawyer. *See Bloom*, 149 F.3d at 655 (noting that the indictment "does not charge that [defendant] *used* his office in any way, let alone that he misused it"). In contrast, in this case, Loeper took discretionary action in his official capacity that directly benefitted an unlawfully concealed financial interest.

Although *Bloom* is distinguishable, Panarella asks us to adopt the specific limiting principle espoused by *Bloom*, which held that "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained from it) for personal gain." *Id.* at 656-57. We see several problems with *Bloom's* definition of honest services fraud as limited to misuse of office for personal gain.

First, we believe that the notion of misuse of office for personal gain adds little clarity to the scope of § 1346. Panarella contends that because there is no allegation in the superseding information that Loeper sold his vote,

there was no misuse of office for personal gain. The government responds that Loeper misused his office for personal gain because he concealed a financial interest while taking discretionary action directly benefitting that interest. This dispute between the government and Panarella as to whether, on the facts alleged in the superseding information, Loeper misused his office for personal gain illustrates the difficulty in applying the standard "misuse of office for personal gain" and suggests that this standard, rather than clarifying the meaning of "scheme or artifice to deprive another of the intangible right of honest services," 18 U.S.C. § 1346, adds an extra layer of unnecessary complexity to the inquiry.

In addition to its lack of clarity, "misuse of office for personal gain" risks being both over-inclusive and under-inclusive as a limiting principle. To the extent that, as Panarella argues, misuse of office for personal gain does not cover a public official's nondisclosure of a conflict of interest, it is too narrow, since, as discussed below, nondisclosure of a conflict of interest in a fiduciary setting falls squarely within the traditional definition of fraud, and poses a similar threat to the integrity of the electoral system as that posed by misuse of office for personal gain. *See infra* Section III.C. Conversely, to the extent that "misuse of office for personal gain" would envelop anyone from an elected official who uses his position of power to seduce a young intern to a Senator who takes home pencils from the office supply cabinet for personal use, the standard is too broad. And to the extent that it is unclear whether the standard would cover the public officials in the examples above and in the case before us,

it is too vague to cure whatever ambiguity exists in the meaning of honest services fraud.

Although the *Bloom* court stated that "[n]o case we can find in the long history of intangible rights prosecutions holds [sic] that a breach of fiduciary duty, without misuse of one's position for private gain, is an intangible rights fraud," *id.* at 656, such cases do exist, even in the Seventh Circuit. *See, e.g., United States v. Bush,* 522 F.2d 641 (7th Cir.1975); *see also United States v. Espy,* 989 F.Supp. 17 (D.D.C.1997), *rev'd in part on other grounds,* 145 F.3d 1369 (D.C.Cir.1998). In *Bush,* the Seventh Circuit squarely held that the defendant's concealment of a conflict of interest amounted to honest services fraud, even though "[t]here is no concrete evidence of extortion, bribery, kickbacks, or a violation of any criminal law other than the mail fraud statute." *Bush,* 522 F.2d at 646 (footnote omitted). Although the *Bloom* panel asserted that "the indictment[ ] in . . . *Bush* . . . alleged that the defendant[ ] converted to private use information that [he] possessed by virtue of [his] public position[ ]," 149 F.3d at 655, we can find no mention of this fact in the *Bush* opinion, and therefore cannot agree with the *Bloom* court that conversion of information to private use was the basis for the holding in *Bush.*

Rather than substituting one ambiguous standard for another in holding that an official deprives the public of his honest services only if he misuses office for personal gain, we believe that state law offers a better limiting principle for purposes of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud. *Cf. United States v. Brumley,* 116 F.3d 728, 734-35 (5th Cir.1997) (en banc) (using state law to define

the contours of honest services fraud). Although we need not decide whether a violation of state law is always necessary for nondisclosure to amount to honest services fraud, we note that the clarity of Pennsylvania's disclosure statute criminalizing a public official's nondisclosure of his sources of income addresses rule of lenity concerns, *see infra* Section III.D, more effectively than does "misuse of office for personal gain." Moreover, the existence of a violation of state law in this case mitigates the federalism concerns that arise from federal prosecutions of local public officials, *see infra* Section III.B, in a way that "misuse of office for personal gain" does not.

Bloom considered the use of state law as a limiting principle, since the advice that the defendant in *Bloom* gave his client – to use a proxy bidder at a tax scavenger sale at which the client's property was being sold – counseled the client to engage in unlawful conduct. Ultimately, however, the *Bloom* court rejected the use of state law as a limiting principle:

> One way to cope with this problem [of the breadth of honest services fraud] would be to limit prosecutions to cases in which a defendant's acts not only violated a fiduciary duty but also transgressed some other rule of law. . . . As a limiting principle, this has two shortcomings. First, Bloom did not violate 35 ILCS 200/21-265(a)(1); only [Bloom's client] and the straw purchaser did so. Second, and more important, this line of argument has nothing to do with Bloom's status as an alderman. If advising a client to violate a state law in order to avoid paying taxes is a scheme to defraud the

> governmental body that should have received those taxes . . . , then every member of the bar would be as culpable as Bloom.

Bloom, 149 F.3d at 654. We find this reasoning unpersuasive as a basis for rejecting use of state law as a limiting principle.

The fact that Bloom did not violate the relevant state law is in itself no reason to reject state law as a limiting principle – it simply shows that if state law is adopted as a limiting principle, then Bloom did not commit honest services fraud. Similarly, the fact that the state law "ha[d] nothing to do with Bloom's status as an alderman" is not a reason for rejecting as a limiting principle state law that does relate to a defendant's status as a public official. Under either the limiting principle adopted in *Bloom*, which requires misuse of office for personal gain, or the limiting principle that requires a violation of some state criminal law regulating public officials, Bloom's conviction would have been reversed. In our view, the *Bloom* court thus failed to explain why misuse of office for personal gain provides a sounder limiting principle than state law.

B.

We are mindful that the prosecution of state public officials for honest services fraud raises federalism concerns about the appropriateness of the federal government's interference with the operation of state and local governments. *See McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) (refusing to "construe the [federal mail fraud] statute in a manner

that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials"). In our view, use of state law as a limiting principle defining the scope of honest services fraud in close cases better addresses these federalism concerns than does the limiting principle of misuse of office for personal gain, which Panarella urges upon us.

In this case, the intrusion into state autonomy is significantly muted, since the conduct that amounts to honest services fraud is conduct that the state itself has chosen to criminalize. *See United States v. Antico*, 275 F.3d 245, 262, 2001 U.S.App. LEXIS 25318, at *43 n. 18 (3d Cir.2001) ("[W]e need not reconcile the principles of federalism with § 1346 in this case because [defendant] owed a duty to the citizens of Philadelphia under state and local law."). *See generally George D. Brown, Should Federalism Shield Corruption? – Mail Fraud, State Law and Post Lopez Analysis*, 82 Corn. L.Rev. 225, 282-99 (1997). To be sure, the violation of Pennsylvania's disclosure statute is only a misdemeanor, *see* 65 Pa.C.S.A. § 1109(b), whereas violation of the federal mail fraud statute may result in up to five years imprisonment, *see* 18 U.S.C. § 1343. This disparity in punishment, however, may occur whenever federal criminal law defines predicate offenses by reference to state law. *See, e.g.*, 16 U.S.C. §§ 3372(a)(2) & 3373(d) (making it a federal criminal offense to transport, sell, or purchase fish or wildlife obtained in violation of state law); 18 U.S.C. § 1955 (making it a federal criminal offense to conduct a gambling operation in violation of state law).

Indeed, it is a truism that a healthy federalism involves some interposition of state and federal governments into each other's respective spheres of sovereignty. *See Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947) (requiring state courts of general jurisdiction to entertain claims predicated on federal law where Congress has conferred concurrent jurisdiction); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (requiring federal courts sitting in diversity jurisdiction to apply and enforce state law); The Federalist No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) ("The different governments will controul each other; at the same time that each will be controuled by itself.").

In particular, federal prosecution of state and local public officials can play a beneficial role where state prosecutors are reluctant to bring charges against political allies or superiors. *See United States v. Schermerhorn*, 713 F.Supp. 88, 92 n. 4 (S.D.N.Y.1989) ("[O]ur own experiences in this court have taught us that numerous illegal kickback, election, and like schemes involving state and local officials are, for whatever reasons, often not prosecuted by state law enforcers. It is empirically clear to us, therefore, that in the absence of federal intervention many of these political *crimes* would go unpunished, and perhaps worse, unnoticed or undiscovered."); Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. Cal. L.Rev. 367, 377 (1989) ("For a variety of reasons, not all of them venal or corrupt, local prosecutors have generally been unable to prosecute local corruption consistently and effectively.").

C.

Rather than limiting honest services fraud to misuse of office for personal gain, we hold that a public official who conceals a financial interest in violation of state criminal law while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud. *See United States v. Woodward*, 149 F.3d 46, 62 (1st Cir.1998) ("A public official has an affirmative duty to disclose material information to the public employer. When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's motivation behind an official act." (quoting *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir.1996))); *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir.1979), *aff'd* 602 F.2d 653 (4th Cir.1979) (en banc) ("Provided the requisite intent is shown, the official's failure to disclose the existence of a direct interest in a matter that he is passing on defrauds the public and pertinent public bodies of their intangible right to honest, loyal, faithful and disinterested government."); *United States v. Keane*, 522 F.2d 534, 546 (7th Cir.1975) ("It is clear to us that one who breaches the public trust by actively concealing a personal financial interest from the public and from a public body charged with the responsibility of passing judgment on matters directly affecting that financial interest, and on which he serves and in which he participates in the formulation of collective judgment of that body, pursuant to his official duties, may be prosecuted for mail fraud."); *see also United States v. Silvano*, 812 F.2d 754, 759 (1st Cir.1987) ("[A]n employee's breach

of a fiduciary duty falls within the strictures of the statute when it encompasses the breach of a duty to disclose material information to the employer.").

We acknowledge that in most cases upholding honest services fraud convictions based on concealment of a conflict of interest there was also an allegation of bribery or that the concealed conflict of interest improperly influenced the defendant's performance of his official duties. At least in some cases, however, courts have convicted solely on the basis of the defendant's intentional breach of a duty to disclose, without any allegation or evidence of bribery or other misuse of office. *See United States v. Bush*, 522 F.2d 641, 646 (7th Cir.1975) (upholding an honest services conviction even though "[t]here is no concrete evidence of extortion, bribery, [or] kickbacks"); *United States v. Espy*, 989 F.Supp. 17, 25 (D.D.C.1997), *rev'd in part on other grounds*, 145 F.3d 1369 (D.C.Cir.1998) ("The law in this Circuit does not require allegations that a *quid pro quo* or selling of office is necessary for the indictment to support charges for honest services fraud."). Moreover, even where evidence of misuse of office in addition to mere nondisclosure exists, courts have explicitly disclaimed any reliance on such evidence in affirming defendants' convictions. *See, e.g., United States v. Bronston*, 658 F.2d 920, 926 (2d Cir.1981) ("[T]he concealment by a fiduciary of material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other is a violation of the statute. . . . [P]roof that the fiduciary relationship was used or manipulated in some way is unnecessary.").

We believe that our holding – that a public official commits honest services fraud if he takes discretionary action that he knows directly benefits a financial interest that the official concealed in violation of state criminal law – has a sound basis in both doctrine and policy. As a doctrinal matter, a public official's nondisclosure of a financial interest while taking discretionary action that the official knows will directly benefit that interest falls squarely within the classical definition of fraud. "Fraud in its elementary common law sense of deceit . . . includes the deliberate concealment of material information in a setting of fiduciary obligation." *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir.1987), *vacated and remanded for consideration in light of McNally*, 484 U.S. 807, 108 S.Ct. 53, 98 L.Ed.2d 18 (1987); *see also United States v. Dial*, 757 F.2d 163, 168 (7th Cir.1985) ("Fraud in the common law sense of deceit is committed by deliberately misleading another by words, by acts, or, in some instances – notably where there is a fiduciary relationship, which creates a duty to disclose all material facts – by silence."). As explained below, the facts alleged in the superseding information in this case sufficiently establish that: (1) Loeper had a duty, both under state common law and state criminal law, to disclose material information to the public; (2) Loeper deliberately concealed his income received from Panarella; and (3) this information was material. We thus find that Loeper's conduct falls squarely within the definition of fraud, in its classical sense.

Both at common law and under Pennsylvania criminal law, Loeper had a duty to disclose to the public material information. "A public official is a fiduciary toward the public, . . . and if he deliberately conceals

material information from them he is guilty of fraud." *Holzer*, 816 F.2d at 307; *see also United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir.1999) ("Public officials inherently owe a fiduciary duty to the public. . . . "); *United States v. Sawyer*, 85 F.3d 713, 733 n. 17 (1st Cir.1996) ("[T]he obligation to disclose material information inheres in the legislator's general fiduciary duty to the public."). This common law duty to disclose is codified by Pennsylvania statute, which requires public officials to file annual Statements of Financial Interest and criminalizes intentional misrepresentations in these statements. *See* 65 Pa.C.S.A. §§ 1104(a), 1105 & 1109(b).

By lying about his income, Loeper breached this duty to disclose. The information that Loeper allegedly concealed in this case – his financial relationship with Panarella – was material because at the time Loeper misrepresented the information, he was taking discretionary action that directly benefitted Panarella's business. *Cf. Holzer*, 816 F.2d at 307 ("The standard of materiality is an objective one; it does not reach every piece of information that a particular litigant might like to have about a judge. A judge need not disclose information that would not make a reasonable person think him incapable of presiding impartially in the case."). In this case, however, Loeper, as a Pennsylvania Senator and in the powerful position of Senate Majority Leader, both spoke and voted against proposed legislation that would have directly harmed Panarella's business. The information that Loeper concealed was therefore material, since knowledge of Loeper's income from Panarella would have been relevant both to Loeper's colleagues in assessing Loeper's comments when deciding how to vote on the bill, and to

the electorate in assessing whether Loeper placed his financial self-interest above the public interest. Moreover, on the facts alleged in the superseding information, Loeper clearly knew that his discretionary action would directly benefit Panarella's business, given Loeper's familiarity with both the nature of the proposed legislation and the nature of Panarella's business.

We thus conclude that because Loeper deliberately concealed a financial interest in violation of Pennsylvania criminal law, while taking discretionary action that he knew directly benefitted that interest, his conduct constituted a scheme to deprive the public of his honest services for purposes of § 1346.

As a matter of policy, we believe this result is justified by the central role of disclosure in a well-functioning representative democracy. Critical to the health of the electoral process is the voters' ability to judge whether their representatives are acting to further their own financial self-interest instead of the public interest. As noted in the margin, the requirement under Pennsylvania law that elected representatives disclose their sources of income serves a purpose analogous to that served by federal laws requiring candidates for federal office to disclose the source of their campaign contributions.[8]

---

[8] In discussing these disclosure requirements, the Supreme Court has observed:

> [D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. . . . The sources of a candidate's financial

The criminal penalties that Pennsylvania law attaches to a public official's concealment of a financial interest affirm the crucial role of disclosure in the electoral process. *See* 65 Pa.C.S.A. § 1101.1(a) ("[P]eople have a right to be assured that the financial interests [of public officials] do not conflict with the public trust. Because public confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials, this chapter shall be liberally construed to promote complete financial disclosure as specified in this chapter.").

Were it easy to detect and prosecute public officials for bribery, the need for public officials to disclose conflicts of interest would be greatly reduced. As long as a public official does not act on a conflict of interest, the conflict of interest by itself poses little threat to the public. One reason why federal and state law mandates disclosure of conflicts of interest, however, is that it is often difficult or impossible to know for sure whether a public official has acted on a conflict of interest. *Cf. Holzer*, 816 F.2d at 308 ("How can anyone prove how a judge would

---

> support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley v. Valeo, 424 U.S. 1, 66-67, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (internal quotation marks and footnote omitted); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 408, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (Kennedy, J., dissenting) (noting that disclosure of campaign contributions allows the public to "judge for itself whether the candidate or the officeholder has so overstepped that we no longer trust him or her to make a detached and neutral judgment").

have ruled if he had not been bribed?"). The only difference between a public official who accepts a bribe and a public official who receives payments while taking discretionary action that benefits that payor, as Loeper did in this case, is the existence of a quid pro quo whereby the public official and the payor agree that the discretionary action taken by the public official is in exchange for payment. Recognizing the practical difficulties in proving the existence of such a quid pro quo, disclosure laws permit the public to judge for itself whether an official has acted on a conflict of interest.

To sum up, we reject Panarella's argument that an allegation of bribery or other misuse of office is necessary to sustain a conviction for honest services wire fraud. Rather, for the reasons discussed above, we hold that if a public official fails to disclose a financial interest in violation of state criminal law and takes discretionary action that the official knows will directly benefit that interest, then that public official has committed honest services fraud.

D.

Panarella argues that the rule of lenity dictates that we construe § 1346 narrowly to exclude from its scope a public official who conceals a financial interest while taking discretionary action that directly benefits that interest. The rule of lenity, which requires that ambiguities in criminal statutes be resolved against the government, "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v.*

United States, 494 U.S. 152, 158, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990); *see also United States v. Sanders*, 165 F.3d 248, 251 (3d Cir.1999).

We note that, as a textual matter, it is not a strained reading of § 1346 to hold that a public official who deliberately lies about his income while taking discretionary action in his official capacity that directly benefits his concealed financial interest "deprives [the public] of the intangible right of honest services." At all events, our criminal law contains numerous statutes whose construction and application pose difficulties in interpretation. *See, e.g.*, 15 U.S.C. § 1 (criminalizing "[e]very contract, combination . . . , or conspiracy in restraint of trade"). Deprivation of honest services is perforce an imprecise standard, and rule of lenity concerns are particularly weighty in the context of prosecutions of political officials, since such prosecutions may chill constitutionally protected political activity. Moreover, decisions of our own Court stating that "fraud is a broad concept that 'is measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community,' " *United States v. Monostra*, 125 F.3d 183, 186 (3d Cir.1997) (quoting *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir.1987)), do little to allay fears that the federal fraud statutes give inadequate notice of criminality and delegate to the judiciary impermissibly broad authority to delineate the contours of criminal liability.

We believe that the policies underlying the rule of lenity are not implicated in this case, however, because

Loeper's deliberate concealment of his income from Panarella clearly violated a Pennsylvania criminal statute, 65 Pa.C.S.A. §§ 1104(a), 1105 & 1109(b). This statute gave both Loeper and Panarella unambiguous notice that Loeper's nondisclosure was criminal. A public official who deliberately chooses to lie about an income source in violation of a criminal law clearly imposing a duty to disclose does so at his peril. The subsequent efforts taken by Panarella and Loeper to conceal Loeper's initial misrepresentation further undermine any claim of inadequate notice. *See United States v. Holzer*, 816 F.2d 304, 309 (7th Cir.1987), *vacated and remanded for consideration in light of McNally*, 484 U.S. 807, 108 S.Ct. 53, 98 L.Ed.2d 18 (1987) ("Elaborate efforts at concealment . . . are powerful evidence that a defendant's conduct violates an ethical standard well known to him and to the whole community, and not just something thought up after the fact by a perhaps overly sensitive federal judge."); *Dial*, 757 F.2d at 170 ("The defendants' elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing."). Finally, the existence of a clear violation of Pennsylvania criminal law complies with the separation of powers principle requiring legislatures, not courts, to define criminal conduct.

E.

In sum, we hold that where a public official conceals a financial interest in violation of a criminal disclosure statute and takes discretionary action in his official capacity that he knows will directly benefit that interest, the official has engaged in "a scheme or artifice to deprive [the public] of the intangible right of honest services." 18

U.S.C. § 1346. Concomitantly, we emphasize the narrowness of our holding. First, Loeper's nondisclosure was in clear violation of Pennsylvania criminal law. The existence of this violation of state law resolves federalism and vagueness concerns that might otherwise arise in cases such as this.[9] Second, Loeper took discretionary action in his official capacity that he knew would benefit his undisclosed financial interest. This action rendered the information that Loeper concealed material, since the public would find the information relevant in assessing Loeper's voting record. Finally, our holding is limited to public officials, and does not reach private officials' breach of a fiduciary duty to disclose. Because disclosure is critical to

---

[9] Although we hold that the existence of a violation of state law, coupled with the other facts discussed above, is *sufficient* to establish honest services wire fraud in this case, we need not decide whether a violation of state law is *necessary* for nondisclosure of a conflict of interest to amount to honest services fraud. Our decision in *United States v. Antico*, 275 F.3d 245, 2001 U.S.App. LEXIS 25318 (3d Cir.2001), suggested in dicta that a violation of state law is not necessary for nondisclosure of a conflict of interest to constitute honest services fraud. *See* id. at 263 ("Duties to disclose material information affecting an official's impartial decision-making . . . exist within this fiduciary relationship regardless of state or local law codifying a conflict of interest."). However, since the defendant's nondisclosure in *Antico* violated state law, the *Antico* court, like this Court, did not have occasion to hold squarely that a public official who does not violate state law may nonetheless be guilty of honest services fraud for failing to disclose a conflict of interest. *See id.* ("When coupled with the duty imposed by state and local conflict of interest laws, Antico's failures to disclose his financial business arrangement with Ricciardi and to recuse himself from taking action with respect to her applications fall within the scope of honest services fraud.").

the electoral process, unlawful concealment of conflicts of interest by public officials implicates weightier concerns than breaches of fiduciary duty by persons who do not hold public office. *See* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am.Crim. L.Rev. 427, 462 (1998) ("[T]he victims of public corruption lack any right of exit. Put simply, they cannot change governments. But investors can change investments.").

We believe that the narrowness of our holding, and in particular our reliance on Loeper's violation of Pennsylvania criminal law as a limiting principle, avoids the parade of horribles envisioned by those who fear overly broad application of the federal mail and wire fraud statutes. *See United States v. Bloom*, 149 F.3d 649, 654 (7th Cir.1998) (arguing that under the prosecution's theory, "every city employee would be required to shop exclusively in Chicago in order to maximize its receipts from sales taxes, and would be guilty of a federal felony if he bought a pair of boots through the mail from L.L. Bean"); *United States v. Margiotta*, 688 F.2d 108, 140 (2d Cir.1982) (Winter, J., dissenting) (fearing that "[a] partisan political leader who throws decisive support behind a candidate known to the leader to be less qualified than his or her opponent because that candidate is more cooperative with the party organization, is guilty of mail fraud unless that motive is disclosed to the public").

IV.

Finally, we address Panarella's argument that his guilty plea lacked an adequate factual basis, as required

by Federal Rule of Criminal Procedure 11(f). Rule 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." This rule is intended to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *McCarthy v. United States*, 394 U.S. 459, 467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

Because Panarella's argument that his guilty plea lacked an adequate factual basis rests primarily on the same argument that the superseding information failed to charge an offense, we reject his Rule 11(f) challenge.[10] Since we would reach the same result under either a plain

---

[10] Panarella also argues that in reviewing the factual basis for his guilty plea, we should consider only the following exchange with the District Court at his plea colloquy:

> THE COURT: All right. Just to be absolutely certain, Mr. Panarella, did you help Mr. Loeper continue the false disclosure form that he filed, the story about the false disclosure form that he filed in 1993, by some things that you did in 1997?
>
> THE WITNESS: Yes.
>
> THE COURT: That's what I want to be comfortable with. I'm satisfied that the defendant is competent to plead. The plea is voluntary, and not the result of force or threats or any promises, apart from the plea agreement which has been fully disclosed on this record.
>
> There is, I'm comfortable, a factual basis for the plea of guilty, along with accessory after the fact for Mr.

error or abuse of discretion standard of review, we need not decide the question of the appropriate standard of review where, as in this case, a defendant fails to raise a Rule 11(f) challenge before the district court, e.g., by moving to withdraw the plea. *See United States v. Cefaratti*, 221 F.3d 502, 509 & n. 3 (3d Cir.2000) ("A district court's finding of a factual basis for a plea is reviewed for an abuse of discretion. . . . The government maintains that Cefaratti's failure to raise this issue before the District Court necessitates plain error review – an issue on which there is some disagreement in the courts. We need not

---

Panarella's involvement in assisting Mr. Loeper in covering up Mr. Loeper's false cover story.

Panarella contends that this exchange shows that the trial judge relied solely on the admission quoted above, and that in reviewing the District Court's Rule 11(f) finding, we may therefore consider only this admission. Panarella submits that by itself the admission quoted above provides an inadequate factual basis for accepting his guilty plea, even if the theory charged in the superseding information is valid. We do not agree that, in concluding that Panarella's guilty plea had an adequate factual basis, the District Court relied exclusively on the admission quoted above. Before this admission, the government summarized the facts that it would prove at trial, which included Loeper's concealment of his payments from Panarella and the discretionary action taken by Loeper that directly benefitted Panarella. After this summary, the court asked the defendant, "Mr. Panarella, do you agree with the prosecutor's summary of what you did?" Panarella replied "Absolutely." We therefore conclude that the factual basis for Panarella's guilty plea that the trial judge relied on included the government's summary of what it would prove at trial, and Panarella's admission that he "absolutely" agreed with the summary. This admission, together with the admission quoted above, provided an adequate factual basis for Panarella's guilty plea.

decide this issue in light of our disposition." (citations omitted)).

For the foregoing reasons, the judgment of the District Court will be affirmed.

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA

V.

NICHOLAS PANARELLA, JR.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 00-CR0655-01

Edward S. G. Dennis, Jr., Esquire
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 1

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 3, 1343 and 1346	Accessory after the fact to a wire fraud scheme	01/31/97	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ [ ] is [ ] are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 156-36-2867

Defendant's Date of 09/30/45

Defendant's USM No.: None

Defendant's Residence Address:
5 Rockledge Court
Marlton, NJ 08053

Defendant's Mailing Address:
5 Rockledge Court
Marlton, NJ 08053

March 13, 2001
Date of Imposition of Judgment

/s/ Marvin Katz
Signature of Judicial Officer

MARVIN KATZ U.S.D.C.
Senior Judge
Name and Title of Judicial Officer

3/13/01
Date

A TRUE COPY
CERTIFIED TO
FROM THE RECORD
DATED: 3/13/01
ATTEST: EM Purnell
DEPUTY CLERK, UNITED
STATES DISTRICT COURT
EASTERN DISTRICT
OF PENNSYLVANIA

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 6 months.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ [ ] a.m. [ ] p.m. on _____

[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[X] before 2 p.m. on 03/27/01

[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

3/13/01
CC: C. VOTAW – AUSA
E. DENNIS, ESQ
2CC:USM-PROBATION-PRE-TRIAL

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term one year

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

[X] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

[X] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$20,000.00	$

[ ] The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS	$_____	$_____	

[ ] If applicable, restitution amount ordered pursuant to plea agreement $_____

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part

B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [X] Lump sum payment of $ 20,100.00 due immediately; balance due

[ ] not later than _____, or

[ ] in accordance with [ ] C, [ ] D, or [ ] E below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] E below); or

C [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of ____ (e.g., months or years), to commence ____ (e.g., 30 or 60 days) after the date of this judgment or

D [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period

of ____ (e.g., months or years), to commence ____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, inlcuding cost of prosecution and court costs.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report, except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 10

Criminal History Category: I

Imprisonment Range: 6 to 12 months

Supervised Release Range: 1 to 5 years

Fine Range: $ 2,000.00 to $ 20,000.00

[ ] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(B)(ii) (or in offenses committed before April 23, 1996, pursuant to 18 U.S.C. § 3663(d)).

[ ] Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3663A(c)(3)(A).

[ ] Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because determining complex issues of

fact and related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, pursuant to 18 U.S.C. § 3663A(c)(3)(B).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered, pursuant to 18 U.S.C. § 3553(c), for the following reason(s):

STATEMENT OF REASONS

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of a defendant's substantial assistance, or

[ ] for the following specific reason(s):

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1739

UNITED STATES OF AMERICA
v.
NICHOLAS PANARELLA, JR., Appellant
(D.C. Crim. No. 00-cr-00655)

Present: BECKER, Chief Judge,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, BARRY AMBRO, FUENTES,
and WEIS,* Circuit Judges.

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Chief Judge

---

* As to panel rehearing only.

App. 61

DATED: FEB 25 2002

par/cc J.M.B. Esq. R.L.S. Esq. G.A. P. Esq.

18 U.S.C. § 3. Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.

---

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

---

18 U.S.C. § 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

---

(2)

Supreme Court, U.S.
FILED
JAN 29 2002
OFFICE OF THE CLERK

No. 01-1736

In the Supreme Court of the United States

NICHOLAS PANARELLA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

JOHN A. DRENNAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

1289

QUESTION PRESENTED

Whether a public official defrauds the public of his honest services, in violation of 18 U.S.C. 1343 and 1346, when he conceals a financial interest in violation of state criminal law and then takes discretionary action that he knows will directly benefit that interest.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Colten v. *Kentucky*, 407 U.S. 104 (1972)	15
McNally v. *United States*, 483 U.S. 350 (1987)	14
Muscarello v. *United States*, 524 U.S. 125 (1998)	15
Neder v. *United States*, 527 U.S. 1 (1999)	9
Staples v. *United States*, 511 U.S. 600 (1994)	15
United States v. *Antico*, 275 F.3d 245 (3d Cir. 2001)	13
United States v. *Bloom*, 149 F.3d 649 (7th Cir. 1998)	5, 8, 10
United States v. *Brumley*, 116 F.3d 728 (5th Cir.), cert. denied, 522 U.S. 1028 (1997)	8, 11, 13, 14
United States v. *Bryan*, 58 F.3d 933 (4th Cir. 1995)	8, 9, 15
United States v. *Castro*, 89 F.3d 1443 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997)	14, 16
United States v. *Cochran*, 109 F.3d 660 (10th Cir. 1997)	8
United States v. *Cotton*, 122 S. Ct. 1781 (2002)	7
United States v. *DeFries*, 129 F.3d 1293 (D.C. Cir. 1997)	9
United States v. *Devegter*, 198 F.3d 1324 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000)	9
United States v. *Frega*, 179 F.3d 793 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000)	16

Cases—Continued: Page

United States v. *Frost*, 125 F.3d 346 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998) 9, 12
United States v. *Gray*, 96 F.3d 769 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997) 16
United States v. *Handakas*, 286 F.3d 92 (2d Cir. 2002) 15
United States v. *Holzer*, 816 F.2d 304 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988) 15
United States v. *Lanier*, 520 U.S. 259 (1997) 14
United States v. *Lopez-Lukis*, 102 F.3d 1164 (11th Cir. 1997) 10
United States v. *McDonough*, 56 F.3d 381 (2d Cir. 1995) 14
United States v. *O'Hagan*, 521 U.S. 642 (1997) 8, 14
United States v. *Olano*, 507 U.S. 725 (1993) 7
United States v. *Paradies*, 98 F.3d 1266 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997) 16
United States v. *Rybicki*, 287 F.3d 257 (2d Cir. 2002) 11, 12, 15, 16
United States v. *Sawyer*, 239 F.3d 31 (1st Cir. 2001) 8, 9, 14
United States v. *Szur*, 289 F.3d 200 (2d Cir. 2002) 16
United States v. *Waymer*, 55 F.3d 564 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996) 16
United States v. *Wells*, 519 U.S. 482 (1997) 15
United States v. *Woodward*, 149 F.3d 46 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999) 15

Statutes and rule:

16 U.S.C. 3372(a)(2) 13
16 U.S.C. 3373(d) 13
18 U.S.C. 2 3
18 U.S.C. 3 2
18 U.S.C. 1341 3

Statutes and rule—Continued:

	Page
18 U.S.C. 1343	2, 3
18 U.S.C. 1346	*passim*
18 U.S.C. 1955	13
65 Pa. Cons. Stat. Ann. (West 2000):	
§ 1104(a)	11
§ 1105	11
§ 1109	13
§ 1109(b)	11
Tex. Penal Code Ann. § 36.08(e) (West 1994)	11
Fed. R. Crim. P. 12(b)(2)	4

In the Supreme Court of the United States

No. 01-1736

NICHOLAS PANARELLA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-48) is reported at 277 F.3d 678.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2002. A petition for rehearing was denied on February 25, 2002. The petition for a writ of certiorari was filed on May 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of being an accessory after the

fact, in violation of 18 U.S.C. 3, to wire fraud in violation of 18 U.S.C. 1343 and 1346. Pet. App. 49. The court of appeals affirmed petitioner's conviction. *Id.* at 1-48.

1. Between 1993 and 1997, petitioner paid the then-majority leader of the Pennsylvania Senate, Senator F. Joseph Loeper, Jr., more than $330,000 for consulting services that Loeper allegedly performed for petitioner's tax collection business. Petitioner and Loeper concealed their business relationship while Loeper undertook legislative action that directly benefitted their business interests. Pet. App. 4-6; Superseding Information paras. 5-9.

More specifically, in 1993, petitioner and Loeper entered into an agreement under which petitioner paid Loeper a monthly consulting fee. Superseding Information para. 5. Loeper failed to disclose the payments on state disclosure forms that were intended to inform Pennsylvania voters of possible biases held by their legislative representatives. *Id.* at paras. 7, 31-32. Petitioner directed third persons to pay Loeper's consulting fees, and did not report his payments to Loeper on federal tax forms. *Id.* at paras. 26-29. Loeper also lied to a *Philadelphia Inquirer* reporter in August 1997 concerning the nature of his business relationship with petitioner, *id.* at para. 33, and both Loeper and petitioner asked third parties to confirm Loeper's misrepresentations to the reporter, *id.* at paras. 34-38.

During that time, Loeper engaged in legislative action beneficial to petitioner's business. Superseding Information paras. 9, 24-25. Petitioner specialized in collecting Pennsylvania's "business privilege tax" for local governments. *Id.* at paras. 1-2, 21-22. Petitioner's tax collection techniques eventually became controversial, and state legislative proposals in 1994 and 1995 sought to prohibit them. *Id.* at paras. 23-25. When the

proposed legislation came before the Pennsylvania Senate, Loeper outspokenly opposed it and introduced an amendment to strike the provisions aimed at eliminating petitioner's collection techniques. *Ibid.* At the time Loeper was taking legislative action that benefitted petitioner's business, petitioner owed Loeper over $37,000. Within days of Loeper's actions on the Senate floor, he received hidden payments—including a secret $5000 cash payment—at petitioner's direction. Gov't C.A. Br. 12.

Loeper also promoted petitioner's efforts to obtain no-bid state tax collection work. For example, at Loeper's request, the chief of a state agency from which petitioner hoped to obtain no-bid contracts attended a meeting in Loeper's office with Loeper and petitioner. At the meeting, Loeper vouched for petitioner's abilities without disclosing their business relationship. Superseding Information para. 30; Gov't C.A. Br. 13.

2. The grand jury returned a seven-count indictment charging petitioner with aiding and abetting a mail and wire fraud scheme in violation of 18 U.S.C. 2, 1341 (mail fraud), 1343 (wire fraud), and 1346 (honest services fraud).[1] Pet. App. 6. Petitioner moved to dismiss the indictment for failure to state a crime, but the district court denied the motion. *Ibid.* On December 12, 2000, the government filed a single-count superseding information charging petitioner with violating 18 U.S.C. 3 by being an accessory after the fact to a wire fraud scheme in violation of 18 U.S.C. 1343 and 1346.[2] Superseding

---

[1] Section 1346 provides that, as used in the mail, wire, and bank fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

[2] Section 3 provides in relevant part:

Information para. 39. Petitioner pleaded guilty to the charge in the superseding information without objecting to the information or reserving the right to challenge its sufficiency on appeal. Pet. App. 6. The district court sentenced petitioner to six months of imprisonment, to be followed by one year of supervised release, and a $20,000 fine. *Id.* at 7.

3. The court of appeals affirmed petitioner's conviction. Pet. App. 1-48. The court first held that Federal Rule of Criminal Procedure 12(b)(2) permitted petitioner to challenge the sufficiency of the information on appeal despite his unconditional guilty plea. Pet. App. 7-23. The court then rejected petitioner's challenge to the information and his related argument that his guilty plea lacked an adequate factual basis. *Id.* at 23-48.

The court explained that petitioner "appears to concede that, on the facts alleged in the superseding information, if Loeper is guilty of committing honest services wire fraud in violation of §§ 1343 and 1346, then [petitioner] is guilty of being an accessory after the fact under 18 U.S.C. § 3. Thus, although Loeper is not a defendant in this case, the critical question is whether the facts alleged in the superseding information establish that Loeper committed honest services wire fraud." Pet. App. 23. Petitioner contended that the facts alleged in the information were insufficient absent "an additional allegation that Loeper's discretionary action was influenced by [petitioner's] payments." *Id.*

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

18 U.S.C. 3.

at 27. The court rejected that contention and held that "where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services." *Ibid.*

In so holding, the court rejected petitioner's reliance upon *United States* v. *Bloom*, 149 F.3d 649 (1998), in which the Seventh Circuit reversed the honest services fraud conviction of a Chicago alderman who, in his independent capacity as a private attorney, allegedly deprived Chicago of tax revenues by advising a client to use a proxy to bid at a tax scavenger sale at which the client's property was being auctioned.[3] The court explained that *Bloom* did not assist petitioner because the charges in *Bloom* did not involve any actions taken in the defendant's official capacity whereas "Loeper took discretionary action in his official capacity that directly benefitted an unlawfully concealed financial interest." Pet. App. 28.

The court went on to reject petitioner's suggestion that it adopt the *Bloom* court's limiting principle for Section 1346 liability under which "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained from it) for personal gain." Pet. App. 28 (quoting *Bloom*, 149 F.3d at 656-657). Noting that whether the misuse of office for personal gain includes or excludes the conduct at issue in this case was subject to dispute, the court reasoned that such a limiting principle would add little clarity to the scope of Section 1346 liability

---

[3] As the Seventh Circuit noted, "[a]ldermanic positions in Chicago are part-time jobs * * * [and,] [i]n his private life, [defendant] is a lawyer." *Bloom*, 149 F.3d at 650.

and would risk being both under- and over-inclusive. *Id.* at 28-30. The court also observed that the result in *Bloom* would have been the same under the analysis that the court adopted in this case. *Id.* at 32.

The court expressly refrained from deciding whether a violation of state law is always necessary for non-disclosure of a conflict of interest to constitute honest services fraud. Pet. App. 31; see *id.* at 44 n.9. The court reasoned, however, that the federalism and state autonomy concerns sometimes raised by honest services cases are significantly muted here because Loeper's conduct did violate state criminal law. See *id.* at 33-34. The court also noted that a public official's non-disclosure of a financial interest in violation of state law while taking discretionary action that directly benefits that interest falls squarely within the classical definition of fraud, because it involves the deliberate concealment of material information in violation of a duty to disclose. *Id.* at 37-39. In addition, the court observed, its holding was supported as a matter of policy because disclosure is critical to "the voters' ability to judge whether their representatives are acting to further their own financial self-interest instead of the public interest," *id.* at 39, a conclusion affirmed by Pennsylvania's decision to back up its disclosure requirement with criminal penalties, *id.* at 40.

Finally, the court of appeals rejected petitioner's rule of lenity argument that he and Loeper had inadequate notice that Loeper's actions were criminal. Pet. App. 41-43. The court noted that it did not strain the language of Section 1346 to conclude that a public official who lies about his income sources while taking action that directly benefits an income source that he has concealed "deprives [the public] of the intangible right

of honest services." *Id.* at 42. The court also noted that petitioner and Loeper had "unambiguous notice that Loeper's nondisclosure was criminal" under Pennsylvania law, and that the fact that petitioner and Loeper endeavored to conceal Loeper's misrepresentations undermined any plausible claim of inadequate notice. *Id.* at 43.

ARGUMENT

1. Petitioner contends (Pet. 9-18) that this Court should grant certiorari to resolve a conflict among the courts of appeals over the appropriate scope of honest services fraud under 18 U.S.C. 1346. Petitioner, however, overstates the differences among the courts of appeals on the scope of Section 1346 and fails to identify any decision of another court of appeals that conflicts with the decision in this case. This Court's review is therefore not warranted.[4]

Petitioner contends that divergences in circuit authority concerning the interpretation of Section 1346 "have subjected state and local officials and * * * private individuals * * * to unprecedented and unpredictable criminal prosecutions based largely on

---

[4] Even if there were a conflict on the scope of honest services fraud that was presented by the facts of this case, the case would be a poor vehicle to resolve that conflict. Petitioner did not challenge the sufficiency of the information before the district court, so any review by this Court would be at most for plain error. See *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Petitioner has not shown plain error because he has not contended that he would not have pleaded guilty if the superseding information contained the additional allegations that he contends were necessary. See *id.* at 735-736 (reversal for plain error appropriate only when error "affect[s] substantial rights" and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.").

the predilections of federal prosecutors." Pet. 9. He similarly asserts that "an individual may be convicted of honest services mail or wire fraud in one circuit based on conduct that would require an acquittal or dismissal of an indictment in another." Pet. 17. He fails to support those assertions, however, with any cases that have reached conflicting results on comparable facts. Even more fundamentally, he fails to identify any disagreement among the courts of appeals that this case presents an opportunity to resolve.

For example, as petitioner notes (Pet. 13), the Fifth Circuit appears to require that the government prove that the defendant violated a duty "rooted in state law." *United States* v. *Brumley*, 116 F.3d 728, 734 (en banc), cert. denied, 522 U.S. 1028 (1997). Other courts of appeals have stated that a violation of state law is not always a necessary element of honest services fraud. See *United States* v. *Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001); *United States* v. *Bryan*, 58 F.3d 933, 940-941 (4th Cir. 1995), abrogated on other grounds by *United States* v. *O'Hagan*, 521 U.S. 642 (1997); see also *United States* v. *Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) (declining to adopt requirement that defendant have violated "some other rule of law"). This case, however, does not present an opportunity for the Court to resolve any disagreement on that question. The court of appeals expressly refrained from deciding the issue, see Pet. App. 31, 44 n.9, and Loeper's conduct violated state law, so petitioner would not benefit even from the approach more favorable to defendants.[5]

---

[5] Relying upon *United States* v. *Cochran*, 109 F.3d 660, 667-668 & n.3 (10th Cir. 1997), petitioner suggests that some but not all circuits require a showing of materiality to support a conviction for honest services fraud. It is well settled, however, that proof of

Petitioner does not point to any case in which a court of appeals has rejected the holding of the court of appeals here—that a public official commits honest services fraud when he conceals a financial interest in violation of state criminal law and then takes discretionary action that he knows will directly benefit that interest. In fact, the case law from other circuits that have discussed the issue suggests that they would reach the same result as the court of appeals here. See *Sawyer*, 239 F.3d at 40 (stating that a public official commits honest services fraud if he "fail[s] to disclose a conflict of interest, resulting in personal gain"); *United States* v. *Devegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) ("benefitting from an undisclosed conflict of interest will support the conviction of a public official for depriving his or her constituents of the official's honest services"), cert. denied, 530 U.S. 1264 (2000); *United States* v. *DeFries*, 129 F.3d 1293, 1306 (D.C. Cir. 1997) ("misrepresentation or intentional non-disclosure—two inherently dishonest acts—converted the employee's breach of duty into a deprivation of his honest services"); *United States* v. *Frost*, 125 F.3d 346, 369 (6th Cir. 1997) (upholding honest services fraud conviction of a private citizen based on non-disclosure of a conflict of interest that created a reasonably foreseeable risk of economic harm and implying that risk of harm may not be required in a case against a public official because "conflicts of interest may harm the public merely by giving the illusion of unfairness"), cert. denied, 525 U.S. 810 (1998); *Bryan*, 58 F.3d at 942 (citing with approval

---

materiality is required under all three statutes (mail, wire, and bank fraud) that could form the basis for a conviction for honest services fraud. See *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

cases finding violations based on failure to disclose conflicts of interests).

Petitioner incorrectly asserts (Pet. 17) that his case "likely would" have been decided differently in the Seventh Circuit under *Bloom*. As the court of appeals explained (Pet. App. 28), *Bloom* does not assist petitioner because the charges that were reversed in that case were based on actions that the defendant undertook in his private, non-official capacity. *Bloom* did not involve the situation confronting the court of appeals here—one in which a public officer acting in his official capacity violated his disclosure obligations under state law while simultaneously taking legislative action that benefitted his concealed financial interests.

Moreover, Loeper's conduct satisfies the test articulated in *Bloom* for when a public official violates Section 1346. The court stated in *Bloom* that a public official would violate Section 1346 if he "misused his office for private gain." See 149 F.3d at 655. Here, the government charged that Loeper actively pursued legislative ends directly benefitting his and petitioner's business interests while he concealed those interests in violation of a state law disclosure requirement. Superseding Information paras. 5-38. That conduct constituted the misuse of Loeper's office for his private gain. See *United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (suggesting that "a political official uses his office for personal gain" when he "personally benefits from an undisclosed conflict of interest."). Thus, although the information does not *in terms* allege that Loeper "misused his office for private gain," the facts it alleges establish that Loeper did just that, and the information satisfies the standard articulated in *Bloom*.

Petitioner likewise asserts that his case "might well" have been decided differently by the Fifth Circuit

under *Brumley*, "because the superseding information contained no explicit allegation of state law violation and, to the extent it did, the state statute at issue primarily prohibits the *appearance* of impropriety or corruption." Pet. 17. Contrary to petitioner's assertion, the superseding information *did* contain express allegations of Loeper's violations of Pennsylvania state law. Superseding Information paras. 31-32. Moreover, the Pennsylvania law at issue does not prohibit the "appearance of impropriety" but requires state legislators to disclose their financial interests, including their outside sources of income. See 65 Pa. Cons. Stat. Ann. §§ 1104(a), 1105, 1109(b) (West 2000).

There is no conflict between the decision in this case and the decision in *Brumley*, which upheld the conviction under Section 1346 of a state adjudicative officer who accepted payments from attorneys who practiced before him and acted in his official capacity on behalf of those attorneys. Although the *Brumley* court stated in dicta that "a violation of state law that prohibits only appearances of corruption will not alone support a violation of §§ 1343 and 1346," 116 F.3d at 734, as noted, the state disclosure law here is not a prohibition of appearances of corruption. And the court upheld the conviction in *Brumley* based on a state law that prohibited the same kind of conduct that occurred here—a public official's acceptance of a benefit from a person interested in a matter on which the official took action in performing his job. See *id.* at 736 (discussing Tex. Penal Code Ann. § 36.08(e) (West 1994)).

Petitioner also contends that his conviction would have been reversed under the Second Circuit's decision in *United States* v. *Rybicki*, 287 F.3d 257 (2002), because "it was not reasonably foreseeable that [petitioner's and Loeper's] purported scheme would [have]

depriv[ed] the 'victim' of any economic benefit." Pet. 17. Even if there were a conflict between the decision in this case and *Rybicki*, that conflict would not warrant this Court's review at this time because the Second Circuit recently voted to rehear *Rybicki* en banc to consider whether Section 1346 is unconstitutionally vague on its face. 7/3/02 Order, *United States* v. *Rybicki*, Nos. 00-1043, 00-1044, 00-1052, 00-1055.

There is, however, no conflict between this case and *Rybicki*. The court in *Rybicki* affirmed the convictions in that case, just as the court of appeals did here. Moreover, *Rybicki* did not involve a breach of a duty by a public official acting in his official capacity, but rather an allegation of honest services fraud in the private sector. The Second Circuit might well not require a showing that economic harm is reasonably foreseeable in a case involving honest services fraud by a government official. See *Frost*, 125 F.3d at 368-369 (adopting requirement of reasonably foreseeable risk of economic harm in a private sector case but suggesting that risk of harm may not be required in a case against a public official because "conflicts of interest may harm the public merely by giving the illusion of unfairness"). In any event, the fraudulent scheme in this case entailed the risk of economic harm because it involved a state legislator's failure to disclose his economic interest in tax legislation on which he took vocal and instrumental official action.[6]

---

[6] Petitioner suggests that economic harm was not a foreseeable result because Pennsylvania voters received an economic benefit from Loeper's actions. The *Rybicki* court expressly rejected the similar argument that the government could not demonstrate economic harm because kickbacks to insurance adjusters did not result in claim settlements that were outside of the "reasonable range." 287 F.3d at 267. The court explained that the argument

2. Petitioner argues (Pet. 19-22) that the decision of the court of appeals violates principles of federalism because it ties the existence of honest services fraud to the presence of a violation of state law. The premise of petitioner's argument is mistaken, however, because the court of appeals expressly refrained from deciding whether a violation of state law is required to establish honest services fraud. See Pet. App. 31, 44 n.9. Moreover, as the court of appeals noted, the presence of a state law violation reduces rather than increases any potential federalism concerns that may be presented by honest services fraud. See *id.* at 33, 44. See also *Brumley*, 116 F.3d at 735.

Petitioner contends (Pet. 20-21) that reliance on state law trenches on federalism because the federal offense of honest services fraud may involve penalties that are significantly harsher than the penalties that would be imposed based solely on the violation of state law. But the six-month term of imprisonment imposed on petitioner for aiding Loeper's violation of Section 1346 was not out of step with the one-year maximum prison term that Pennsylvania provides for violations of the disclosure laws. See 65 Pa. Cons. Stat. Ann. 1109 (West 2000). In any event, as the court of appeals explained, such disparities in punishment can occur whenever federal criminal law defines predicate offenses by reference to state law, which is not an infrequent occurrence. See Pet. App. 33 (citing 16 U.S.C. 3372(a)(2), 3373(d) and 18 U.S.C. 1955).

The courts of appeals have uniformly rejected federalism challenges to Section 1346. See, *e.g.*, *United*

---

conflates reasonably foreseeable harm with actual or intended harm, neither of which is required to sustain an honest services fraud conviction. *Ibid.*

States v. *Antico*, 275 F.3d 245, 262 n.18 (3d Cir. 2001); *United States* v. *Sawyer*, 239 F.3d 31, 43 n.13 (1st Cir. 2001); *Brumley*, 116 F.3d at 735; *United States* v. *Castro*, 89 F.3d 1443, 1456 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997). There is no reason for this Court to review petitioner's federalism challenge here.

3. a. Petitioner also contends (Pet. 18-19, 22-23) that the court of appeals' interpretation of Section 1346 violates due process because it does not give defendants fair notice of the actions proscribed by the statute. That contention lacks merit.

Due process requires only that "the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997). As described above, there was ample precedent from other circuits indicating that a public official who personally benefits from an undisclosed conflict of interest violates Section 1346. See p. 9, *supra* (citing cases). That interpretation of the statute is, as the court of appeals explained (Pet. App. 37-38), consistent with the classical definition of fraud, which includes the deliberate concealment of material information in a setting of fiduciary obligation. See, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 654-655 (1997). And it is consistent with the scope of honest services fraud before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), which Congress sought to overturn when it enacted Section 1346. See Pet. App. 36 (citing pre-*McNally* cases). Moreover, as the court of appeals noted, both petitioner and Loeper had "unambiguous notice that Loeper's nondisclosure was criminal" under Pennsylvania law. *Id.* at 43. In addition, Loeper, with petitioner's assistance, engaged in extensive efforts to hide his activities—action that evidences that peti-

tioner and Loeper knew Loeper's actions were improper. See *United States* v. *Woodward*, 149 F.3d 46, 62-63 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999); *Bryan*, 58 F.3d at 942-943; *United States* v. *McDonough*, 56 F.3d 381, 389-390 (2d Cir. 1995); *United States* v. *Holzer*, 816 F.2d 304, 309 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988).[7]

b. Relying upon *United States* v. *Handakas*, 286 F.3d 92 (2d Cir. 2002), petitioner argues (Pet. 27-30) that Section 1346 would have been unconstitutionally vague as applied to Loeper. *Handakas*, however, does not assist petitioner. As noted above, the Second Circuit has recently ordered the en banc rehearing of *United States* v. *Rybicki*, 287 F.3d 257 (2002), to consider whether Section 1346 is unconstitutionally vague on its face. 7/3/02 Order, *United States* v. *Rybicki*, *supra*. In the rehearing order, the court expressly ordered the parties to address *Handakas*. Accordingly,

---

[7] Petitioner's contention (Pet. 26) that the court of appeals' interpretation of Section 1346 contravenes the rule of lenity fails for similar reasons. The rule of lenity "applies only if, after seizing everything from which aid can be derived, [the court] can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (citations and internal quotation marks omitted). The rule of lenity is not applicable here because, as explained in the text above, petitioner has not shown that "there is a grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994) (internal quotation marks omitted)). Cf. *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972) (due process requirements are not "designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.").

the Second Circuit's position on the vagueness of Section 1346 has yet to be fully articulated.

Moreover, *Handakas* is the only case in which a court of appeals has sustained a vagueness challenge to Section 1346, and the court did so in a context that bears no similarity to the facts of this case. The court in *Handakas* held that Section 1346 was unconstitutionally vague as applied to a private defendant's breach of his contractual obligations to a local government corporation. This case, in contrast, involves a public official's deceptive breach of his fiduciary duty and simultaneous violation of state criminal law.

Outside of the narrow circumstances involved in *Handakas*, the courts of appeals (including the Second Circuit) have uniformly rejected claims that Section 1346 is void for vagueness. See *United States* v. *Szur*, 289 F.3d 200, 209 n.5 (2d Cir. 2002); *Rybicki*, 287 F.3d at 264; *United States* v. *Frega*, 179 F.3d 793, 803 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000); *United States* v. *Gray*, 96 F.3d 769, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Paradies*, 98 F.3d 1266, 1282-1283 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997); *Castro*, 89 F.3d at 1455; *United States* v. *Waymer*, 55 F.3d 564, 568-569 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
JOHN A. DRENNAN
Attorney

JULY 2002

(3)

No. 01-1736

Supreme Court, U.S.
FILED
SEP 12 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

NICHOLAS PANARELLA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RICHARD L. SCHEFF
Counsel of Record
JILL BAISINGER
MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP
123 South Broad Street
Philadelphia, PA 19109
(215) 772-1500

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

I. THE SECOND CIRCUIT'S DECISION TO GRANT REHEARING *EN BANC* TO THE PANEL DECISION IN *UNITED STATES V. REBECCA* DOES NOT DIMINISH THE CONFLICT AMONG THE CIRCUITS REGARDING THE PERMISSIBLE SCOPE OF HONEST SERVICES FRAUD 2

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

United States v. Bloom, 149 F.3d 649 (7th Cir. 1998) 4

United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) 4

United States v. Handakas, 286 F.3d 92 (2d Cir. 2002) 2, 3, 4

United States v. Panarella, 277 F.3d 678 (3d Cir. 2002) 2, 4

United States v. Rybicki, 287 F.3d 257 (2d Cir. 2002) ... 1, 3, 4

STATUTES

18 U.S.C. § 2 2

18 U.S.C. § 1343 ..... 1, 2

18 U.S.C. § 1346 ..... 2, 3

RULES

SUP. CT. R. 13 4

SUP. CT. R. 15 ..... 1, 3

STATEMENT

Petitioner Nicholas Panarella, Jr., filed a timely Petition for a Writ of Certiorari on May 24, 2002, seeking this Court's review of whether a private citizen with no disclosure obligations may be convicted of being an accessory after the fact to a scheme to defraud the public of honest services in violation of 18 U.S.C. § 1343 when the alleged honest services fraud consisted solely of a public official's uncharged concealment of his lawful business relationship with the private citizen without misuse of office. Br. in Support of Petition for Writ of Cert. at 1 [hereinafter, "Petition"]. The Brief for the United States in Opposition to that Petition [hereinafter, "Brief in Opposition"], filed on July 29, 2002, notes that on July 3, 2002 the United States Court of Appeals for the Second Circuit ordered rehearing *en banc* for *United States v. Rybicki*, 287 F.3d 257 (2d Cir. 2002). *See* Br. in Opposition at 11-12.

A party may file "a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing" or may file a reply brief "addressed to new points raised in the brief in opposition." SUP. CT. R. 15.6, 15.8. Pursuant to those Rules, Petitioner addresses in this brief the new arguments raised by the Solicitor General pertaining to the Second Circuit's July 3, 2002, grant of rehearing *en banc* for *United States v. Rybicki*, 287 F.3d at 257.

I. THE SECOND CIRCUIT'S DECISION TO GRANT REHEARING *EN BANC* TO THE PANEL DECISION IN *UNITED STATES V. RYBICKI* DOES NOT DIMINISH THE CONFLICT AMONG THE CIRCUITS REGARDING THE PERMISSIBLE SCOPE OF HONEST SERVICES FRAUD

As described more fully in both the Petition and in the Brief in Opposition, Petitioner, a private citizen, was convicted of being an accessory after the fact, 18 U.S.C. § 2, to a scheme to defraud the public of the honest services of a Pennsylvania State senator, Joseph Loeper, in violation of 18 U.S.C. §§ 1343, 1346. Pet. at 4-6; Br. in Opposition at 2-4. According to the Superseding Information that formed the basis of this conviction, Senator Loeper improperly failed to disclose payments received pursuant to a lawful consulting relationship with Petitioner and subsequently enlisted Petitioner's assistance in misleading a reporter regarding these payments. *United States v. Panarella*, 277 F.3d 678, 681 (3d Cir. 2002). Petitioner contended before the United States Court of Appeals for the Third Circuit that his conviction was improper because the Superseding Information failed to allege a crime. *Id.* at 682.

Following the Third Circuit's affirmance of the conviction, the Petition before this Court sought review of this issue because of the growing divergence among the various federal circuits regarding the permissible scope of honest services fraud. Petitioner described recent decisions by the Second Circuit that have increasingly limited the meaning of "honest service fraud"; in particular, on one occasion, the Second Circuit found 18 U.S.C. § 1346 unconstitutional as applied and reversed the conviction at issue. *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002); *see*

also Pet. at 11. Shortly after the *Handakas* decision, the Second Circuit ruled in *United States v. Rybicki*, 287 F.3d at 257, that honest services fraud must include a reasonably foreseeable risk of economic or pecuniary harm to the victim that is more than de minimus. *Id.* at 260, 266; *see also* Pet. at 15-16. *Rybicki*, however, affirmed the appellant's conviction. *Rybicki*, 286 F.3d at 260.

In arguing that this Petition should not be granted, the Solicitor General's Brief in Opposition contended that there is no true conflict among the circuits. Br. in Opposition at 7-12. While Petitioner respectfully disagrees with the Solicitor General's interpretation of the appellate decisions to which both briefs refer, Petitioner acknowledges that, pursuant to this Court's Rules, enlargement of arguments previously articulated in the Petition itself would be inappropriate. SUP. CT. R. 15.6, 15.8. However, the Brief in Opposition particularly emphasized the Second Circuit's recent line of cases and contended that the *Rybicki* decision could not establish a conflict among the circuits warranting a grant of the Petition because, "Even if there were a conflict between the decision in this case and *Rybicki*, that conflict would not warrant this Court's review at this time because the Second Circuit recently voted to rehear *Rybicki* en banc to consider whether Section 1346 is unconstitutionally vague on its face. 7/3/02 Order, *United States v. Rybicki*, Nos. 00-1043, 00-1044, 00-1052, 00-1055." Br. in Opposition at 12.

The Second Circuit's decision to rehear *Rybicki en banc*, however, does not constitute a reason to reject the Petition. First, as described in the Petition itself, Pet. at 10-18, numerous other appellate courts besides the Second Circuit have taken divergent approaches to honest services

fraud: whether or not the Second Circuit affirms *Rybicki*, reverses *Rybicki* in light of *Handakas*, or rejects both *Handakas* and *Rybicki*, those divergences will still exist. *See* Pet. at 13-17 (describing different approaches). In particular, the divergence between the Third Circuit's approach in *Panarella*, 277 F.3d at 678, *see* Pet. at 12-13, and those of the Seventh Circuit and the Fifth Circuit will remain unaffected. *Id.* at 13-17 (addressing, *inter alia*, *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998) (permitting conviction only upon a showing of misuse of office), and *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (requiring proof of a state law violation prohibiting more than an appearance of impropriety)).[1]

More fundamentally, however, acceptance of the position articulated in the Brief in Opposition would place petitioners in an untenable situation. At most, a petition for certiorari must be filed no more than ninety days following the denial of a timely petition for rehearing *en banc*. SUP. CT. R. 13. A petitioner may not wait until all potentially relevant litigation in every circuit is resolved before seeking this Court's review, and, indeed, this Court's Rules make no provision for such a tactic. Assuming *arguendo* that the Second Circuit's *en banc* resolution of the *Rybicki* decision would be dispositive in assessing

---

[1] Moreover, regardless of any coincidental equivalence in sentence length between the possible state and charged federal crime in this matter, Br. in Opposition at 13, the ongoing divergence among the circuits will continue to implicate federalism issues apart from *Rybicki*'s outcome. In particular, private citizens will continue to face potential federal felony liability in some jurisdictions, state misdemeanors in others, and no criminal liability at all in still others for the same conduct.

whether a conflict among the circuits exists, this would counsel in favor of deferring consideration of this Petition until that time. It does not, however, counsel in favor of rejecting the Petition entirely, particularly when doing so would prejudice the Petitioner's ability to raise these issues before this Court. Indeed, the existence of an arguable divergence in approach within the Second Circuit, between two cases decided within a month of each other, only highlights the confusing and uncertain state of law in this area and the need for this Court to rule definitively on the scope of honest services fraud pursuant to the federal mail and wire fraud statutes.

CONCLUSION

For the foregoing reasons and for the reasons articulated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

RICHARD L. SCHEFF
Counsel of Record
JILL BAISINGER
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 South Broad Street
Philadelphia, PA 19109
(215) 772-1500
Counsel for Petitioner

September 12, 2002